No. 9885

United States
Circuit Court of Appeals
For the Ninth Circuit.

PEOPLE OF THE STATE OF CALIFORNIA, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9885

PEOPLE OF THE STATE OF CALIFORNIA,
on the relation of Charles J. McColgan, as
State Franchise Tax Administrator,
Appellant,

vs.

JOHN HOWARD BRUCE,
Appellee.

AGREED STATEMENT OF THE CASE

Defendant is, and has been since about May 10, 1937, a resident of the State of Nevada. Prior to May 10, 1937, for all years material to this action, defendant, was a resident of the State of California.

Charles J. McColgan is a resident of California, and is the duly appointed, qualified and acting Franchise Tax Commissioner of the State of California.

This action was instituted in March of 1940 to collect state income taxes assertedly due from defendant to plaintiff. Judgment for defendant was entered on March 22, 1941, from which plaintiff has appealed.

The Facts

In early 1936, defendant, while married, living with his wife, and a resident of California, bought

in California from a resident of California, an Irish Sweepstakes ticket for the price of $2.50. Defendant's name appeared on the counterfoil which was sent to the Sweepstakes officials in Ireland. Soon the drawing occurred in Ireland and defendant's ticket drew a horse which was running in the race. Defendant then sold a half interest in his ticket to a New York syndicate for $5,000, which sum he subsequently (in April, 1937) reported to the State of California and on which he paid a California income tax. Defendant retained this ticket in his possession at all times. About May 26, 1936, the race was run and the horse drawn by defendant's ticket won first place, entitling the holder or holders of the ticket to the first prize of $150,000.

Payment of his winnings was not immediately made to defendant, however, for suit was instituted in the Irish courts by one William Leathe to prevent the payment of the entire proceeds to defendant and to compel the payment of half the proceeds to Leathe. This suit was withdrawn by Leathe some time between May 10, 1937 and June 25, 1937, for a settlement of $5,000. Immediately thereafter $75,000 was received by the New York syndicate, and defendant received the other $75,000, less $5,000 used to settle with Leathe and $10,000 for attorneys fees and expenses. On June 25, 1937 the First National Bank in Reno collected $59,356.66 for defendant and credited that sum to defendant's account, less charges.

Defendant and his wife were residents of California when the ticket was purchased and when the race was run. The defendant and his wife then moved to Nevada under circumstances described by defendant in his testimony, which was as follows:

> "We thought we would have to go over there (Ireland) to fight the case, then in the latter part of 1936 they (the attorneys) thought it would be settled out of court, so in the early part of 1937 we started looking around and trying to make up our mind what to do and where to go. I had previously lived in Nevada."
>
> * * * * * * *
>
> "I don't remember the date, to tell you the truth, because we came up here (Nevada) quite some time before the final settlement, I really haven't the slightest idea in the world. It was after we had come up here, I don't remember the date."

On or about May 10, 1937, defendant and his wife became residents of that State. Thereafter the Leathe suit was settled and defendant was paid.

The California Franchise Tax Commissioner, on June 10, 1937, issued a jeopardy assessment against defendant, assessing him with income tax of $4,345.84 on net income of $70,000. Defendant at that time had not and since has not filed an income tax return with the California authorities reporting his winnings from the Irish Sweepstakes nor

has he paid a tax to California thereon. The assessment notice was duly mailed to defendant at his last known address, but he did not receive it.

As the assessment was not paid in whole or in part, this action was instituted in the United States District Court for the District of Nevada to recover the unpaid assessment, and defendant was duly served and appeared. The complaint which was filed alleged that the federal district court for Nevada had jurisdiction. Those allegations were as follows:

> "This court has jurisdiction because this is a controversy between citizens of two states involving an amount in excess of $3,000. Plaintiff Charles J. McColgan is a citizen of the State of California and defendant John Howard Bruce is a citizen of the State of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000).
>
> "This court has jurisdiction because this is an action for taxes. Jurisdiction is founded on Section 24(5) of the Judicial Code, United States Code Title 28, Section 41(5).
>
> "This court has jurisdiction because Article IV Section 1 of the United States Constitution, commonly known as the full faith and credit clause, compels it to exercise jurisdiction."

Thereafter the complaint alleged the facts on which the claimed cause of action was based.

The answer of defendant denied that the court had jurisdiction and denied that defendant owed any California income tax.

At the trial the plaintiff offered in evidence, as proof of Irish law, the reported opinion in each of two Irish decisions. This offer of evidence, the objection thereto, the court's ruling and the evidence itself are contained in the Reporter's Transcript which is a separate part of the record on appeal, and may be found therein.

After all of the evidence had been introduced, and there being no conflict in said evidence, the plaintiff moved that the jury be dismissed because there was nothing for the jury to decide as the only questions presented were of the law to be applied to the facts. The defendant objected to this motion on appropriate grounds. The motion was granted over defendant's objection and the jury was dismissed. The defendant took an exception.

The Decision of the District Court and The Notice of Appeal

Thereafter the court held that it had jurisdiction over the parties and the subject matter, found that defendant was a resident of Nevada when he came into possession of the income involved, and ruled that California did not have jurisdiction to tax that income. Judgment was entered for defendant on March 22, 1941. A copy of that judgment is set forth

hereinafter. Notice of Appeal was filed by plaintiff on June 13, 1941. A copy of that notice of appeal is set forth hereinafter.

Points to be Relied on by Appellant

The points to be relied on by appellant are as follows:

1. That the court had jurisdiction.

2. That the Personal Income Tax Act of California imposed an income tax on defendant on account of the income concerned herein.

3. That the State of California had jurisdiction to impose the tax.

4. That the tax was due in the amount assessed.

5. That the trial court erred in not admitting in evidence reported Irish decisions as proof of Irish law.

Judgment of the Court

"Judgment entered for defendant pursuant to Opinion and Decision filed this day."

NOTICE OF APPEAL

"Notice Is Hereby Given that the People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Administrator, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on March 22, 1941.

EARL WARREN,
Attorney General of the State of California;
H. H. LINNEY,
H. H. Linney, Deputy,
VALENTINE BROOKES,
Valentine Brookes, Deputy,
Attorneys for Plaintiff, People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Administrator, 600 State Building, San Francisco, California."

The parties hereto agree that the foregoing constitutes a complete and accurate statement of the case, and that said statement contains all the facts and proceedings which will need to be considered by the Circuit Court of Appeals in the appeal herein, excepting those contained in the reporter's transcript forming a separate part of the record on appeal.

People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Administrator,
Plaintiff and Appellant.
By EARL WARREN,
Attorney General of the State of California.
H. H. LINNEY,
Deputy Attorney General.

VALENTINE BROOKES,
Deputy Attorney General.
JOHN HOWARD BRUCE,
Defendant and Appellee.
By A. P. JOHNSON.

Approved:
FRANK H. NORCROSS,
Judge, United States District Court
For the District of Nevada.

In the District Court of the United States, in and for the District of Nevada.

No. 104

PEOPLE of the STATE OF CALIFORNIA, ON THE RELATION OF CHARLES J. McCOLGAN, as STATE FRANCHISE TAX ADMINISTRATOR,

Plaintiff,

vs.

JOHN HOWARD BRUCE,

Defendant.

TRIAL

PROCEEDINGS RELATING TO THE OFFER IN EVIDENCE OF THE REPORTS OF THE TWO IRISH COURT DECISIONS, PLAINTIFF'S EXHIBITS NOS. 3 AND 4 FOR IDENTIFICATION.

At the conclusion of testimony of the defendant, John Howard Bruce, the following proceedings

were had:

Mr. Linney: Now, if the Court please, we think in this case there is involved the law of Ireland. We have two cases in the Ireland court which we would like to introduce in evidence in this case. I presume Mr. Johnson would be agreeable to stipulating that if the cases are introduced in evidence we can withdraw these volumes, which belong to the San Francisco law library, and substitute copies, certified by someone that they had been compared, etc. Now if we introduce these cases in evidence, perhaps the Court will require that we read them to the jury. They are quite long and it will take us a little time.

Mr. Johnson: To which records, your Honor, we naturally object. I do not think under our procedure in Nevada we are permitted to read any law to the jury, so I do most respectfully object to the introduction as evidence in this case any decisions of courts of Ireland or any other foreign country. I do not [9] think that is proper, your Honor, under procedure in the State of Nevada. I do not know about California, but I am quite confident of that ruling in this State, your Honor.

Mr. Linney: Perhaps I didn't make it quite clear. I didn't suppose this Court would take judicial notice of decisions of the Irish courts. That is the reason why, if they go into evidence, we have to offer these particular cases. Otherwise, if the Court takes judicial notice of the decisions, we don't need to do it.

The Court: Is there any other matter, other than questions of law as offered by the courts of Ireland in the opinions that you refer to?

Mr. Linney: These opinions deal with interlocutory situations and the application of the law of Ireland to this situation, involving somewhat similar transaction; in other words, Sweepstake Winnings.

The Court: I am under the impression that that matter could be considered better as a question of law. If you wish to give the jury instructions in respect to any case, that may be deemed applicable to this case if the Court finally permits that is proper.

Mr. Linney: Would it be stipulated that we can, in any event, offer these volumes in evidence, without reading them to the jury, and submit copies of these two particular reports? I think I should perhaps name them for the record.

The Court: For the record they may be offered, with the privilege of substituting copies and for the present they would be simply, the copies or the books themselves, considered as received for identification at the present time. [10]

Mr. Linney: I offer then, if the Court please, the case of Mabel McKie, Plaintiff, vs. The Rt. Hon. The Earl of Granard and Others, found in Law Reports of Ireland 1933. There doesn't seem to be any number on the book, your Honor, at page 464. That is the High Court of Justice.

In the case of Apicella And Another v. Scala And Others—I am not an Irish scholar, but the words

here are "Right of action in Saorstat Eireann" High Court and that is found in Volume 66 Irish Law Times Reports, 1932, at page 33.

(McKie vs. The Rt. Hon. The Earl of Granard marked Plaintiff's Exhibit No. 3 for identification; Apicella and Another vs. Scala and Others marked Plaintiff's Exhibit No. 4 for identification.)

Is it understood, your Honor, we may take these books with us, I mean when this case is over?

The Court: I think that can be arranged.

Mr. Johnson: I understand these are now merely offered for the purpose of identification.

The Court: They are received for that purpose. They are offered in evidence. We will consider that later before the case goes to the jury.

Mr. Linney: That is all, your Honor. [11]

* * * * *

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present at the trial of the case entitled People of the State of California on the Relation of Charles J. McCoglan, as State Franchise Tax Administrator, Plaintiff, vs. John Howard Bruce, Defendant, No. 104, held at Carson City, Nevada, on the 16th and 17th days of December, 1940, and took verbatim shorthand notes of the testi-

mony adduced and proceedings had at that trial; that the foregoing pages, numbered 1 to 3 inclusive, comprise a full, true, and complete transcript of my shorthand notes taken on December 16, 1940, with relation to the offer in evidence of Plaintiff's Exhibits Nos. 3 and 4 for Identification, as taken from pages 107, 108, 109, and 110 of notebook No. 23 for 1940.

Dated at Carson City, Nevada, this 10th day of July, 1941.

MARIE D. McINTYRE,
Official Court Reporter, United States District Court, District of Nevada.

[Endorsed]: Filed July 10, 1941. O. E. Benham, Clerk. By O. F. Pratt, Deputy. [12]

No. 104

United States District Court, District of Nevada

PLAINTIFF'S EXHIBIT NO. 3
for Identification
Meredith J.
1933

April 24; May 9, 23, 26.

MABEL McKIE,

Plaintiff,

v.

THE RT. HON. THE EARL OF GRANARD and OTHERS (Trustees for Statutory Deposits of Prize Money under the PUBLIC CHARITABLE HOSPITALS (Temporary Provisions) Act, 1930, THE COMMITTEE conducting the GRAND NATIONAL SWEEPSTAKE under the provisions of the said Act, and HOSPITALS TRUST, LIMITED (Being the promoters of said sweepstake for said Committee), and FRANCIS PATRICK McKIE,

Defendants.

Conflict of laws—Decrees of foreign Court—Prize money in Sweepstake in Irish Free State—Holder of a winning ticket resident in California—Application for interlocutory injunction restraining payment out of prize money—Decrees of California Court directing money to be lodged in Californian Court and directing

mode of payment—Decrees of Californian Court not final and conclusive—Enforcement of decrees in Irish Free State.

The plaintiff's husband was the purchaser of a ticket which drew a horse in a sweepstake in the Irish Free State entitling the purchaser to a certain sum as prize money. Subsequently the plaintiff applied for a divorce in the Superior Court of California, the parties being resident in that State. Plaintiff on such application was granted a "temporary restraining order" enjoining her husband from disposing of the prize money, and directing him to deposit it with the Clerk of the Court in California to await the further order of the Court. Subsequently the California Court granted an interlocutory decree dissolving the marriage and the Court decreed that the winning ticket with the prize money won by it was the "community property" of the plaintiff's husband and the plaintiff, and the Court assigned and awarded the same to the plaintiff. The plaintiff then issued a plenary summons in the High Court of the Irish Free State, naming as defendants the Trustees for Statutory Deposits of Prize money under the Public Charitable Hospitals (Temporary Provisions) Act, 1930, the Committee conducting the said Sweepstake under the provisions of the said Act, Hospitals Trust, Limited (being the promoters of the said Sweepstake for the said Committee), and her husband, and

claiming: 1, a declaration that she was the owner of the ticket and entitled to the prize money and all other benefits won by the said ticket, and 2, an order that the defendants, the said Trustees and Committee and Hospitals Trust, Limited, should pay to her the amount found due, and 3, an injunction restraining the said defendants from paying out or parting with the said prize money or other benefits thereof to any other person. Subsequently she applied for an interlocutory injunction in these terms, relying on the decree of the Californian Court.

Held that the decree of the Californian Court could not have any effect in the Irish Free State as the subject-matter of the decree was not within the control of the State of California, and accordingly the motion for an interlocutory injunction must be refused.

The principle stated by Blackburn J. in Castrique v. Imrie, L. R. 4 H. L. 414, at p. 435, applied.

Motion for an interlocutory injunction.

On the 24th April, 1933, the plaintiff, Mabel McKie, issued a plenary summons, the defendants being the Trustees for Statutory Deposits of Prize Money under the Public Charitable Hospitals (Temporary Provisions) Act, 1930, the Committee conducting the Grand National Sweepstake under the provisions of the said Act, "Hospitals Trust, Lim-

ited'' (being the promoters of the said Sweepstake for the said Committee) and Francis Patrick McKie, and the summons claimed: 1, a declaration that the plaintiff was the owner of the ticket, No. C. E. 30472, in the Grand National Sweepstake of March 24th, 1933, and was entitled to the prize money and all other benefits won by the said ticket; (2) an account of the prize money and other benefits due on the said ticket; (3) an order that the defendants, the said Trustees and Committee and Hospitals Trust, Limited, pay to the plaintiff the amounts found due on same; (4) an injunction restraining the defendants, the said Trustees and Committee and Hospitals Trust, Limited, from paying out or parting with the said prize money or other benefits thereof to any person other than the plaintiff.

On the same day the plaintiff applied for and obtained an interim order restraining the defendants until the 9th May, 1933, from paying out or parting with the prize money, and on the 9th May the plaintiff brought this present application for an interlocutory injunction.

In support of this application Mr. Robert Hayes, the plaintiff's solicitor, made an affidavit setting out the facts as follows:

On the 1st of October, 1931, the plaintiff was married to the defendant, Francis Patrick McKie, and on or about the 29th of March, 1932, the said defendant deserted the plaintiff and left her destitute. On a date subsequent to the marriage but prior to the dissolution thereof the said defendant pur-

chased a ticket, No. C. E. 30472, in the Irish Free State Hospitals' Sweepstake on the "Grand National" Race under the nom-de-plume of "Gordon Richards." The said ticket drew the horse known as "Solanum" in the said race and the said defendant thereby became entitled to a prize in the said sweepstake of £660 7s. 6d., or, approximately, two thousand two hundred and fifty dollars in the currency of the United States.

In or about the month of March, 1933, and subsequent to the purchase of the said ticket the plaintiff instituted proceedings in the Superior Court of the State of California, United States of America, against the defendant for divorce, and on the 5th day of April, 1933, the said Court granted to the plaintiff an interlocutory decree dissolving the said marriage.

Deponent referred to a certified copy of the interlocutory decree made by the said Superior Court of the State of California, the plaintiff's "Complaint for divorce," in support of said decree sworn by her on the 24th March, 1933, being as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

"MABEL McKIE,

Plaintiff,

v.

"FRANCIS PATRICK McKIE also known as FRANK PATRICK McKIE,

Defendant.

"COMPLAINT FOR DIVORCE.

"Plaintiff complains of defendant and for cause of action alleges:

"1. Plaintiff herein is now and has been for more than one year last past, a resident of the City and County of San Francisco, State of California, and defendant is now and has been for a long period of time last past a resident of the said City and County of San Francisco, in said State.

"2. Plaintiff and defendant intermarried at and in the City and County of San Francisco, State of California, on October 1st, 1931, and ever since have been and now are husband and wife.

"3. There are no children, issue of said marriage.

"4. Plaintiff and defendant separated on or about March 29th, 1932. The time from mar-

riage to separation was approximately six months.

"5. There is community property belonging to the said plaintiff and defendant and said community property consists of the following:

"Heretofore and within a period of less than one month prior to the commencement of this action, defendant purchased a ticket of the Irish Free State Hospitals' Sweepstake on a horse race known as the 'Grand National,' held under the Public Charitable Hospitals Acts of 1930-1931-1932 of Great Britain (sic), conducted and managed by the Hospitals' Committee, the said horse race being run at Aintree, England, on March 24th, 1933, the number of said ticket is unknown to this plaintiff. Said ticket aforesaid was purchased by the defendant out of community property or earnings of the parties hereto and said purchase of said ticket was made at and in the City and County of San Francisco, State of California. A public drawing of the tickets issued in said Irish Free State Hospitals' Sweepstake was held on March 22nd, 1933, in Dublin, Ireland, under the supervision of the Chief Commissioner of Police at Dublin, and as a result thereof the ticket so purchased and now held by the defendant became entitled to participate in the distribution of prizes given pursuant to the said Sweepstake to an amount in excess of one hundred thousand ($100,000.00) dollars, the exact amount of which is unknown

to this plaintiff. Said defendant, as plaintiff is informed and believes, and therefore alleges, is now in possession of said ticket and threatens to, and will, unless restrained by this Court, collect the proceeds thereof and appropriate the same to his own use and depart from the jurisdiction of this Court therewith without turning over, delivering, or transferring any part thereof to this plaintiff.

"Plaintiff is without the necessary means to prosecute this action and pay the necessary costs involved therein or counsel's fees, and has no plain, speedy, or adequate remedy at law to protect her rights in and to the said community property.

"6. That during the period of more than one year next immediately preceding the filing of this complaint, defendant neglected to provide plaintiff the common necessaries of life, he having the ability to do so. That plaintiff has for a period of more than one year last past been compelled to rely upon her own efforts in order to provide herself with the common necessaries of life.

"As a second, separate and further cause of action, plaintiff complains and alleges: [States further facts necessary to support application for divorce.]

"Wherefore plaintiff prays that upon the trial of this action, it be decreed that plaintiff has a good and valid cause of action against

defendant upon the ground of defendant's wilful neglect of plaintiff and upon the ground of defendant's extreme cruelty to plaintiff and that the bonds of matrimony existing between plaintiff and defendant be dissolved: that defendant be ordered to pay the plaintiff the necessary costs of this action and necessary counsel's fees, and, further, that, pending the trial of this action, the said defendant, his servants, agents and counsel and all other persons acting in aid and assistance of said defendant be restrained from disposing of the said ticket in the said Irish Free State Hospitals' Sweepstake and any proceeds or money received therefrom, and, further, that the said defendant be restrained by an order of this Court from leaving the jurisdiction of this Court unless and until the said defendant deposits with the Clerk of this Court the aforesaid ticket of the Irish Free State Hospitals' Sweepstake to await the order of this Court with respect thereto; and for such other and further relief as may be meet and proper in the premises; and that the community property referred to be awarded to plaintiff."

The following "order to show cause and temporary restraining order" was thereon made:

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

"MABEL McKIE,

Plaintiff,

v.

"FRANCIS PATRICK McKIE also known as FRANK PATRICK McKIE,

Defendant.

"ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.

"Upon reading and filing the complaint of Mabel McKie herein and good cause appearing therefor, it is hereby

"Ordered that the defendant, Francis Patrick McKie, also known as Frank Patrick McKie, do be and appear before the above entitled Court (in the Court room of department 10 thereof, City Hall, San Francisco, California) on Tuesday the 28th day of March, 1933, at 10 o'clock a. m. of said day, then and there to show cause, if any he has, why the relief prayed for in the complaint herein should not be granted; and it is further

"Ordered that, pending the hearing upon this order to show cause and until the further order of the Court, the said defendant Francis Patrick McKie, also known as Frank Patrick

McKie, his servants, agents, counsellors and all others acting in aid and assistance of the said defendant, and each and all of said persons be and they are hereby enjoined and restrained from in any manner transferring, assigning, selling or in any manner disposing of the ticket in the said Irish Free State Hospitals' Sweepstake described in the complaint and from transferring, assigning or in any manner disposing of the proceeds and/or money received therefrom, and, further, that the said defendant be and he is hereby ordered and directed forthwith to deposit with the Clerk of this Court the aforesaid ticket in the Irish Free State Hospitals' Sweepstake and/or any money or proceeds received therefrom, to await the further order of the Court with respect thereto. It is further ordered that a copy of this order to show cause and temporary restraining order be served upon the defendant herein together with a copy of said complaint.

"Dated March 24th, 1933.

"THOS. F. GRAHAM, Judge."

The material portion of the "Interlocutory Decree of Divorce" was as follows:

"This cause came on regularly for trial on this 5th day of April, 1933, upon the plaintiff's complaint herein taken as confessed by the defendant, whose default for not answering had been duly entered, and upon the proofs taken

herein, from which it appears, and this Court finds, that all the allegations of the complaint are true, and that they are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency; and it also appearing to said Court that said defendant was regularly served with the summons issued in this action; and all and singular the law and the premises being by the Court here understood and fully considered:

"Wherefore it is here ordered, adjudged and decreed and this Court does hereby order, adjudge and decree as and for an interlocutory decree herein, that plaintiff is entitled to an interlocutory decree of this Court, adjudging that she has established grounds for the dissolution of the bonds of matrimony heretofore and now existing between said plaintiff and said defendant and subject to the provisions of the statute in such case made and provided, and, in pursuance thereof, such interlocutory decree is hereby made on the grounds of defendant's extreme cruelty to plaintiff and that, upon the expiration of one year from the entry of this decree, final judgment granting said decree and restoring said parties to the status of single persons, be entered herein.

"It appearing to the Court, and the Court so finds, that a certain ticket, No. C. E. 30472, of the Irish Free State Hospitals' Sweepstake for the Grand National race held at Aintree, Eng-

land, on March 24th, 1933, together with the prize won by said ticket amounting to the sum of approximately twenty-two hundred and fifty dollars ($2250.00) in the drawing conducted in Dublin, Ireland, on March 22nd, 1933, under the supervision of the Dublin Commissioner of Police, is community property of the parties; and the Court further finds that any other ticket or tickets in said sweepstake belonging to or in the name of said defendant and/or Gordon Richards, together with the proceeds thereof or the prizes appertaining thereto, are the community property of the parties.

"It further appearing to the Court from all the facts of the case and the condition of the parties that it is just and proper that said community property be awarded and assigned to the plaintiff, now therefore be it further ordered, adjudged and decreed that the community property hereinbefore in this decree described and all of the same be and the same is hereby assigned and awarded to plaintiff Mabel McKie."

The affidavit of the plaintiff's solicitor continued as follows: Mr. Louis E. Goodman, a member of the firm of Goodman, Bachrack and Brownstone, Attorneys-at-Law, practising in San Francisco, informed deponent that under the law of the State of California all property of either husband or wife acquired while married except property acquired by gift, bequest, descent or devise is community prop-

erty and belongs to both husband and wife and that upon a divorce being granted the Courts of the said State have discretion to award the whole or any part of the community property to either spouse.

That on the 29th March, 1933, a letter was written to Messrs. Craig, Gardner & Co., the auditors and accountants of the Irish Free State Hospitals Sweepstake, warning them not to part with the said prize money without notice to plaintiff's solicitors. That on or about the 19th of April, 1933, the deponent was informed by Mr. O'Reilly, solicitor for the defendant Trustees, that unless restrained by order of the High Court of Justice of the Irish Free State it was the intention of the Trustees to pay out the said prize money to the said defendant, Francis Patrick McKie, or his nominee on Tuesday the 25th April.

In an affidavit filed on behalf of the defendant, Francis Patrick McKie, made by Mr. Albert Hyman Robbins, of 2 Brick Court, Temple, London, Barrister-at-Law, and also an attorney and counsellor-at-law of the United States of America, being a member of the Bar of the State of Illinois and of the Bar of the United States Supreme Court, it was stated that under the law of California upon a "Complaint for Divorce" being filed, the summons and copy of the Complaint are, if possible, served personally upon the defendant. If such personal service is effected and the defendant does not file an answer with the Clerk of the Court within the

time specified in the summons the Clerk must enter the default of the defendant, and thereafter the plaintiff may apply to the Court for the relief demanded in the said Complaint. The Court then hears the proofs or evidence but at this stage can only grant an Interlocutory Decree of Divorce. [Deponent referred to the plaintiff's summons for divorce and the attached "Complaint for Divorce, dated the 24th March, 1933, set out above.] The decree in such proceedings is in the first instance always purely interlocutory and does not become final until one year has expired after the entry of such Interlocutory Decree, at which time the Court may grant such other and further relief as may be necessary to complete the disposition of the action; but if any appeal is taken from the interlocutory judgment, or motion for a new trial made, a final judgment or decree shall not be entered until such appeal or motion has been finally disposed of. Such Interlocutory Decree does not dissolve the marriage but is a declaration that one of the spouses is entitled to a divorce after the expiration of one year after entry. Upon the granting of an Interlocutory Decree on the ground of adultery or extreme cruelty the Court has the discretionary power to allot the community property to the respective parties in such proportions as the Court from all the facts of the case and the condition of the parties may deem just. Such dealing with community property upon the granting of an Interlocutory Decree is of a purely interlocutory nature and a trial Court

should not by such Interlocutory Decree eo instante assign and dispose of community property although it may determine therein how such property shall be ultimately assigned and awarded when the marriage is dissolved by a final decree of divorce. Such an interlocutory decree vests no title to the community property in the plaintiff herein but constitutes a temporary and provisional contract between the parties pending the entry of a final decree. Upon the defendant taking some action, proceeding, or motion to change this status, the Court may make some provision regarding the safeguarding of the community property; but until the Court adjudicates this question the husband has control of the property. In the event of an interlocutory decree being reversed the appellate Courts can allot the community property to the respective parties in such proportions as they may deem just. "Community property" means all property acquired after marriage by either husband or wife, or both, excepting all property acquired either by husband or wife by gift, bequest, devise, or descent. The ordinary law is that the control and management of the community property is in the hands of the husband. In the State of California betting and wagering transactions are illegal. Though the Courts of California would thus refuse the assistance of its process to the purchaser of a sweepstake ticket they will deal with such a ticket when the matter comes before them collaterally as in this case.

The defendant, Francis Patrick McKie, made an affidavit in which he described himself as of 29 Lower Leeson Street, in the City of Dublin, and in which he stated that he was a British citizen and was born in England in 1899. That in the year 1921 he was serving as a seaman on board a ship which touched at San Francisco, and he went ashore and remained in San Francisco. He had no visa or permit of any kind to enter the United States of America and his entry was without the sanction of the immigration authorities and contrary to the laws of the United States. He went to Canada in July, 1925, but returned to San Francisco in November, 1925. His entry into the United States was again without sanction. He married the plaintiff on the 1st October, 1931, in San Francisco. He remained in San Francisco until March, 1932, when he returned to England. He returned to San Francisco in November, 1932, to seek a reconciliation with his wife (plaintiff) with whom he had quarrelled. On this occasion he again entered the United States contrary to law and without the sanction of the immigration authorities. On the 22nd March, 1933, he received a telegram from the Irish Hospitals Trust, Limited, informing him that the ticket No. C. E. 30472 had drawn the horse "Solanum" in the Irish Hospitals' Sweepstake on the Grand National Race, and he immediately telephoned to his wife (plaintiff) and informed her of the fact. On the 24th March, 1933, the plaintiff commenced pro-

ceedings for divorce by swearing the said "Complaint for Divorce."

G. Gavan Duffy K. C. (with him E. S. Robinson) for the plaintiff in support of the motion:

This is not a question of enforcing a foreign judgment, but solely of the preservation of the property pending the trial of the action. The basis of the jurisdiction to grant an interlocutory injunction is the protection of legal rights. On the hearing of a motion for an interlocutory injunction the Court does not determine the legal rights but merely protects them, and the Court presumes the existence of a legal right when a fair prima facie case is made out. The Court does not require a clear legal right or title to be proved: Leney v. Callingham (1); Societe Generale de Paris v. Dreyfus (2). Any vexatious alienation during the progress of a suit will be restrained: Hart v. Herwig (3). The question is whether or not the Court has power to prevent the removal of a specific chattel out of the jurisdiction. It is settled that where an order has been made for the payment of money the Court will restrain dealing with the money so as to put it out of the control of the Court, and in such circumstances the Court will restrain third parties from paying the money to the defendant: Bullus v. Bullus (4). It is not necessary to have a final foreign decree to base

(1) [1908] 1 K. B. 84.
(2) 37 Ch. D. 215.
(3) 8 Ch. 860.
(4) 102 L. T. 399.

a claim by the plaintiff for such protection. Any decree will give the plaintiff such a prima facie right, and no question of international law arises. Dicey's "Conflict of Laws," 4th edit., p. 449, rule 111, lays down that any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid. Rule 112 states that a valid foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error of fact or law, and Henderson v. Henderson (5) is cited in support of this rule.

If there be any question of change of domicile the onus of proving it is on the party alleging it: Udney v. Udney (6).

[They cited also Cruikshank v. Roberts (7); Harmon v. Jones (8); Nouvion v. Freeman (9).]

Cecil Lavery K. C. (with him John Farrell) for the defendant, Francis Patrick McKie:

The foreign decree upon which the plaintiff relies does not fulfil the first essential requirement that it must be final and conclusive. On its face the decree is merely an interlocutory decree of divorce which may become final after twelve months. Yet it is

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(5) 6 Q. B. 288.
(6) L. R. 1 Sc., App. 441.
(7) 6 Mad. 104.
(8) Cr. & Ph. 299.
(9) 15 A. C. 1.

suggested that this interlocutory decree determines property rights between the parties. In McDonnell v. McDonnell (10) it was held that a maintenance order upon which the plaintiff had obtained a final judgment for each instalment due was not such a final judgment. It is settled that our Courts will give effect to a judgment of a foreign Court of competent jurisdiction but only if such judgment is final and conclusive: Nouvion v. Freeman (1); Harrop v. Harrop (2); In re Macartney; Macfarlane v. Mccartney (3); Roussillon v. Roussillon (4); De Brimont v. Penniman (5). The consideration of what is meant by "competent jurisdiction" shows that the foreign judgment in this case is not one of a Court of competent jurisdiction. Competent jurisdiction involves complete jurisdiction over the defendant and over the property in dispute by the Court pronouncing judgment. But the prize money in this case is not within the jurisdiction of the State of California. [He referred to In re Queensland Mercantile and Agency Co. (6).] Nor is the defendant within the jurisdiction of that State. He was born in England of English parents and, though he had lived for ten years in America, he was not a naturalized citizen of that country, which he entered in defiance of the immigration laws.

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(10) [1921] 2 I. R. 148.
(1) 15 A. C. 1.
(2) [1920] 3 K. B. 386.
(3) [1921] 1 Ch. 522.
(4) 14 Ch. D. 351.
(5) 10 Blatch. 436.
(6) [1891] 1 Ch. 536.

Moreover, the foreign judgment here is contrary to the public policy of this country and for this reason cannot be recognized. There is no method known to our law whereby a Court could grant an interlocutory decree of divorce and finally decide the rights of the parties to property legally belonging to one of them. The Courts of this country will not entertain an action upon a foreign judgment obtained upon grounds which would give rise to no cause of action in this country. Such a judgment has no extra territorial jurisdiction: In re Macartney; Macfarlane v. Macartney (7).

It cannot be said that there is no question of enforcing a foreign judgment. Without the interlocutory decree of the State of California the plaintiff could not have obtained the interim injunction, and has now no prima facie case for making that interim injunction interlocutory pending the trial of the action. [They cited also Favorke v. Steinkopff (8); New York Life Insurance Co. v. Public Trustee (9); Cammell v. Sewell (10); Castrique v. Imrie (11); Patrick v. Sheddon (12) Goddard v. Grey (13); Pemberton v. Hughes (14).]

Nolan Whelan for the trustee defendants.

Cur. adv. vult.

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(7) [1921] 1 Ch. 522.
(8) [1922] 1 Ch. 174.
(9) [1924] 2 Ch. 101.
(10) 5 H. & N. 728.
(11) L. R. 4 H. L. 414.
(12) 2 E. & B. 14.
(13) L. R. 6 Q. B. 139.
(14) [1899] 1 Ch. 781.

Meredith, J.:

It appears from the evidence of Mr. Robbins, a member of the Bar of the United States Supreme Court, that, under the law of the State of California, upon the granting of an interlocutory decree for divorce on the ground of adultery or extreme cruelty, the Court has a discretionary power to allot community property to the respective parties in such proportions as the Court, from all the facts of the case, and the condition of the parties, may deem just.

From the Exemplification of Record in an action in the Supreme Court of the State of California, in and for the City and County of San Francisco, between the said plaintiff in these proceedings, as plaintiff, and the said defendant in these proceedings, as defendant, the Court granted such an interlocutory decree for divorce. The Court further adjudicated that a certain ticket, number C. E. 30472, of the Irish Free State Hospitals' Sweepstake for the Grand National Race held at Aintree, England on March 24th, 1933, together with the prize money won by said ticket, was community property. Having so held, and it having appeared to the Court from all the facts of the case and the condition of the parties that it was just and proper that the said community property be awarded and assigned to the plaintiff, the Court further assigned and awarded the same to the plaintiff. On the strength of this assignment and award, and upon that alone,

the plaintiff bases her claim to the equitable relief sought in this action.

The adjudication of the American Court that the property in question is community property is, in itself, of no assistance to the plaintiff. As appears from the evidence of Mr. Robbins the fact of the property being community property would not in itself confer any title on the plaintiff to have the prize money paid to her, or to restrain its payment out to the defendant, Francis Patrick McKie. It is the discretionary order assigning the property, which is property in this country and under the effective jurisdiction of these Courts, that the plaintiff seeks to prevent from being ineffective, and for that purpose seeks an injunction restraining the payment out to the said defendant, and asks for payment to herself, notwithstanding that there remains undischarged and still to be obeyed an order of the 24th March, 1933, by the said Court ordering and directing the said defendant to deposit with the Clerk of the said Court, the said ticket or any money or proceeds received therefrom, to await the further order of the Court with respect thereto. If the said defendant is paid the money and if he obeys the said order the plaintiff will presumably be entitled to apply to the Court in California for payment of the money to her in accordance with the order of the Court awarding and assigning it to her. When the Court awarded and assigned the community property to the plaintiff it granted her no further injunction or order, but left the previous

order to do its work. It is not immediately obvious to me why this Court should interfere with the admirable machinery put into operation by the Court of the State of California.

In Dicey's "Conflict of Laws" (4th ed., at p. 24) I find the following observation: "The plain truth is—and this holds good of England no less than of other States—that every country claims for its own Courts wider extra territorial authority than it willingly concedes to foreign tribunals. Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not 'duly' acquired." Certainly the Courts of the Irish Free State will not be wanting in any ordinary and generally recognized international comity if they decline to resort to their auxiliary or equitable jurisdiction to render effective the award or assignment by a foreign Court of property situate here, and belonging to a person who according to our law is the rightful owner, in exercise of a merely discretionary jurisdiction peculiar to the foreign Court, by which the property can be transferred to a person who only acquires a right or title to it from the order of the Court.

Counsel for the trustee defendants stated that those defendants took no side on the question of title to the prize money. But these sweepstakes are legal in this country, whereas in certain foreign countries they are illegal; and, as I understand, the sweepstake tickets and the prize money can be confiscated. If the plaintiff's contention in this case

is sound, then I do not see why any order of confiscation, even while the property remains in this country, would not be enforceable here. If that were the law, then Hospital Trust, Limited, might as well close down, despite our Act, as far as foreign business is concerned. Surely the plaintiff cannot seriously contend that the title to all the movable property in this country is at the mercy of whatever discretionary jurisdictions foreign countries may confer upon their Courts.

But I have no reason to suppose, and in fact I do not imagine, that the Court of the State of California expected that the Courts of the Irish Free State would give such extra territorial effect to its assignment and award as to give the plaintiff here the orders which she seeks. The order of the California Court anticipated the possibility of the property coming under the effective jurisdiction of that Court. The ticket itself, for anything the Court knew, might have been in the State of California at the time the order was made, and, if it were, the title to the ticket itself as a mere document would have to be considered on a different footing. The evidence of Mr. Robbins is to the effect that in the State of California betting and wagering transactions are illegal, and that the Courts of California would refuse the assistance of its process to the purchaser of a sweepstake ticket. Accordingly the plaintiff asks this Court, on the strength of the judgment of the Californian Court, to do for her what the Californian Court itself would not do. I

can hardly imagine the Californian Court anticipated that her efforts would be successful.

In a recent case I had occasion to deal with agreements made in England assigning sweepstake tickets or shares of such tickets, and I dealt with the question of the law to which the Courts of this country would give effect in determining the validity of such agreements. But no such question, and no question of the assignment or transfer inter partes in a foreign country of movable property situate here, arises in the present case. If the defendant had been in California after he had purchased or been given the ticket in question, and had assigned his rights to the plaintiff then the following observation in In re Queensland Mercantile and Agency Co. (1) would have been in point: "There is another equally well-known rule of law, viz.: that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled." Similarly in Alcock v. Smith (2), Mr. Justice Romer said (p. 255): "Generally, the rights of transferor and transferee on a transfer, in one country, of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons

(1) [1891] 1 Ch. 536, at page 545.
(2) [1892] 1 Ch. 238.

living in, or the personal property may be situate in, a foreign country." Referring to the facts of the case actually before the Court the learned Judge said (p. 256): "Indeed, the question here being legally only as to the right to hold the bill (the document itself) as between claimants not parties to the bill, the case is not different from . . . Cammell v. Sewell (1)." In the same case (at p. 260) Lopes L. J. refers to the authority in favor of the proposition that a transfer abroad of a document of title is governed by the law of the place of transfer.

These Courts in adjudicating on the title to movable property here have from time to time to consider the validity of different transactions in reference to the property that took place abroad, and in determining that subsidiary question will in certain cases give effect to the law of the country where the transaction took place. That is particularly the case in respect of what are commonly called "universal assignments" (see Westlake, 5th ed., p. 193 et seq.). In the present case the assignment, or award of the Court was not any such assignment, but simply an adjudication of the Court which it is sought to make effective here. Mr. Robbins gave evidence that the interlocutory decree for divorce constituted, according to the law of that State, a temporary and provisional contract between the parties. But the Courts of a foreign country do

(1) 5 H. & N. 728; 744; 29 L. J. (Ex.) 350.

not by the fiction of such a contract acquire for their orders any extra-territorial effect that they would not otherwise have.

Consequently there is nothing in the present case to disturb the application of the general principle stated by Mr. Justice Blackburn in Castrique v. Imrie (2): "It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether inter partes or in rem) is within the lawful control of the State whose tribunal has pronounced the judgment." (Cf. judgment of Lord Chelmsford, citing Mr. Justice Blackburn, at p. 448.) If that is clear, then it is clear that the plaintiff in this action can have no case, prima facie or otherwise, and that, accordingly, this motion, on which a prima facie case should be shown, must be refused. In Castrique v. Imrie (3) a passage from Story on the Conflict of Laws is cited with approval, and I may quote it here as it deals with a distinguishable class of cases to which I have referred. The principle that the judgment is conclusive "is applied to all proceedings in rem as to movable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any

(2) L. R. 4 H. L. 414, at p. 435.
(3) At. p. 428.

other foreign tribunal. This is very familiarly known in the cases of proceedings in rem in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, over which such Courts have a rightful jurisdiction founded on the actual or constructive possession of the subject-matter." In this distinguishable class of cases the Court is giving effect to the judgment of a foreign Court. In the other distinguishable class to which I referred the Court finds itself called upon to adjudicate on the validity of some transaction in a foreign country in accordance with the law of that foreign country and without the benefit of an adjudication by a Court of that country.

Mr. Lavery submitted that the judgment relied on by the defendant cannot be regarded as final, and also that the Court would not enforce a judgment against the public policy of this country. He pointed out, with considerable force, that the judgment relied on transferred all the property of a person domiciled here or in England to a person domiciled in California. It attempted to pauperize the defendant. But long before I could get to the consideration of those points my intellect was capsized by the suggestion that, as I have said, the title to all the movable property in Saorstat Eireann is to be at the mercy of the various judicial discretions that any country that can claim to be civilized chooses to bestow on its Courts.

Solicitors for the plaintiff: Hayes & Sons.

Solicitors for the defendant, Francis Patrick McKie: Patrick J. Sheridan & Co.

Solicitor for the trustee defendants: P. J. O'Reilly.

S. V. K.

—The Irish Reports 1933, page 464.

I hereby certify that the attached is a true and correct copy of the report of said case as it appears in 1933 The Irish Reports, at page 464 thereof, published in Dublin, Ireland, by the Incorporated Council of Law Reporting for Ireland.

ORA F. BARNEY

Subscribed and sworn to before me this 7th day of January, 1941.

VALENTINE BROOKES,
Deputy Attorney General of
the State of California.

[Endorsed]: Plaintiff's Exhibit No. 3 for identification. Filed Dec. 16, 1940. O. E. Benham, Clerk.

[Endorsed]: Filed Jan. 9, 1941. O. E. Benham, Clerk.

No. 104

United States District Court, District of Nevada

PLAINTIFF'S EXHIBIT No. 4

for Identification

Filed December 16th, 1940

O. E. Benham, Clerk

* * * * *

APICELLA AND ANOTHER

v.

SCALA AND OTHERS

Oct. 13-28, Nov. 6, 20-26, Dec. 4, 1931.—Conflict of Laws—Contract—Lottery Acts—Saorstat Eireann Sweepstakes—Contract in respect of—Made in Saorstat Eireann—Made in country where lottery invalid—Right of action in Saorstat Eireann—Offer and acceptance—Purchase of Tickets—Return of counterfoils—Gaming Act, 1845 (8 & 9 Vict., c. 109), s. 18—Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930.

A. C. and S. agreed to combine for the purpose of purchasing and acquiring tickets in the Irish Hospitals Sweepstakes. They purchased a number of books of tickets and entered into a written agreement with regard to them. They decided to acquire more tickets and S. wrote for two more books. He then told A. and C. that he wished to sell some of these tickets to his friends and relatives. A. and C. objected as the

books were for the partnership, and said that if he wanted to sell any tickets to his friends or relatives he should procure another book. He was to be at liberty to sell any tickets he might wish to sell out of such book, and any not so sold were to be taken up by the Partnership. S. agreed to this and wrote accordingly for, and procured, not one but two more books. On the 5th or 15th February, 1931, a written agreement was entered into which comprised the last mentioned two books. Unknown to A. and C., S. retained the previous two books for his own use. One of the tickets in the books so retained by S. drew the first prize in the said Sweepstakes. In an action by A. and C. to recover one two-thirds share of the monies accruing to S. from the purchase, acquisition or ownership of the said winning ticket.

Held, that the purchase of a ticket in such a sweepstake and the sending in of the money and counterfoil was an offer, and not an acceptance of an offer.

Held further, that deciding on the number of books to be sent for was no evidence of intention to contract; the parties did not mean to bargain, but merely arrived at a conditional or revocable decision as to the number of books required for the guidance of the party writing for the tickets.

Held further, that if the arrangement to purchase two books was a contract for some two

books, such contract was certainly discharged by the joint purchase of the two books to which the agreement of the 5th or 15th of February, 1931, was expressed to relate, as there was no appropriation of the two books first procured to that contract. The mere refusal of A. and C. to allow S. to dispose of one of the two books which had been procured was not a determination that the transaction should relate to those particular books in any event.

Held further, that the book of tickets which contained the winning ticket was, as a mere chattel, the property of A., C. and S., and was of some value; S. did not derive the prize from the use of the book, but by chance and as a subscriber to the Sweepstake; and therefore the bare ownership of the book did not entitle A. and C. to share in the prize money.

Effect of Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930, in legalizing Lotteries, discussed.

The plaintiffs were Antonio Apicella and Matteo Costantino, Italian Nationals, resident in England. The defendants were Emilio Scala, also an Italian National, resident in England; the Trustees for Statutory Deposits of Prize Money under the Public Charitable Hospitals (Temporary Provisions) Act, No. 12 of 1930, and the Associated Hospitals Committee for the Running of Sweepstakes under the Provisions of the said Act. Under and by virtue of that Act, a sweepstakes was held in Saorstat

Eireann upon a horse-race known as the Grand National, run on the 27th March, 1931. The tickets were sold in books, each containing 12 tickets of a face value of 10/- each, at the price of £5 for each such book, or singly at the price of 10/- for each such ticket. One of the tickets so sold bore the distinguishing letters and numbers F/M.H. 22370. By the terms of the said Sweepstakes the owner or owners of this said ticket became entitled in the events which happened to receive payment in cash of a sum of £354,724 and upwards from the defendant Statutory Trustees. The said ticket was bought by the defendant Emilio Scala, whose name was on the counterfoil, and who paid by cheque for the book containing it. Before the result of the Sweepstakes became known he sold one three-fourth share of the said ticket at the price of £10,500, and retained the remaining one-fourth share. The present action was brought by the plaintiffs to recover a sum of about £60,000, being one two-third share of all monies accruing to the defendant Emilio Scala from the purchase, acquisition or ownership of the said ticket F./M.H. 22370, which, they alleged, was bought by him as agent for and on behalf of himself and each of the plaintiffs. Prior to the happening of the events in dispute the plaintiffs and the defendant Emilio Scala purchased and acquired two books of tickets in the said sweepstakes on their joint account as co-adventurers, as to which said tickets a written agreement was drawn up and signed by all three on January 8th, 1931.

The facts in dispute on which the plaintiffs relied are set out in the following paragraphs of the statement of claim:

12. On or about the 15th day of January, 1931, the plaintiff, Antonio Apicella, having secured information as to persons in Dublin to whom application with a view to purchase and acquisition of tickets could be made, verbally and with the assent of the said Matteo Costantino requested the said Emilio Scala, to whom he communicated the said information, to apply accordingly with a view to the purchase and acquisition of further books of tickets for the joint account of the said Antonio Apicella, Matteo Costantino and Emilio Scala, and the said Emilio Scala verbally agreed * * * to make such application and purchase and acquire further tickets accordingly: the said agreement is hereinafter referred to as the second verbal agreement.

14. In pursuance of the second verbal agreement, the said Emilio Scala applied for and purchased and acquired in Dublin from the Hospitals Trust, Limited, two further books of twelve tickets each for the joint account of himself and the said Antonio Apicella and Matteo Costantino at the price of £10, and each of them, * * * on or about the 5th of February, 1931, paid to the said Emilio Scala a sum of £3 6s. 8d. as and for one-third share of the cost of the said two further books of tickets.

15. The said Emilio Scala, having received the said two further books of tickets, represented to the said Antonio Apicella and Matteo Costantino in or

about the last week of January, 1931, that he wished to be allowed to dispose to his friends of some of the tickets so obtained, though uncertain as to how many tickets his friends would buy from him; the said Antonio Apicella and Matteo Costantino declined to allow any of the said tickets to be disposed of, but they verbally proposed, and the said Emilio Scala verbally agreed, that the said Emilio Scala should purchase and acquire at the price of £5 a further book of tickets for the joint account of the said Antonio Apicella, Matteo Costantino, and Emilio Scala, but upon the terms that he, the said Emilio Scala would be entitled to sell to his friends at face value such of the tickets of such further book as he might dispose of among them within a reasonable time and that he would hold for the joint account of himself and the said Antonio Apicella and Matteo Costantino any cash received by him in respect of such sales in excess of the sum of £5 and all such tickets of such further book as should remain in his hands, and that each of them, the said Antonio Apicella and Matteo Costantino, would pay to the said Emilio Scala one-third of the cost (if any) to the said Emilio Scala of all such tickets of such further book as should so remain in his hands; the said agreement is hereinafter referred to as the third verbal agreement.

17. In pursuance of the third verbal agreement, the said Emilio Scala applied for and purchased and acquired in Dublin at the price of £5 from Hospitals Trust, Limited, a further book of 12

tickets for the joint account of himself and the said Antonio Apicella and Matteo Costantino, and informed the said Antonio Apicella and Matteo Costantino of his purchase and acquisition of such further book, but omitted to disclose to them the distinguishing letters and numbers of the tickets comprised in the said book.

18. On or about the 15th of February, 1931, the said Emilio Scala verbally represented to the said Antonio Apicella and Matteo Costantino that certain of the friends of him, the said Emilio Scala, had wished to have, and that he had sold to his said friends, for sums aggregating £5 10s. 0d., all but one ticket (hereinafter referred to as the outstanding ticket) of the 12 tickets comprised in the said further book of tickets so purchased and acquired by him as last aforesaid, and verbally acknowledged and declared to the said Antonio Apicella and Matteo Costantino that he, the said Emilio Scala, held and would thenceforth hold the outstanding ticket for the joint account of himself and the said Antonio Apicella and Matteo Costantino as well as the sum of 10/-, being the profit in cash in the hands of him, the said Emilio Scala, upon the sale as aforesaid to his friends of 11 tickets from the said further book of 12 tickets.

19. (a) On or about the 15th day of February, 1931, it was verbally agreed by and between the said Antonio Apicella and Matteo Costantino and Emilio Scala, for greater certainty, that the contractual position between them, the said Antonio Apicella,

Matteo Costantino and Emilio Scala, with regard to all tickets then held for their joint account (other than the tickets comprised in the agreement of January 8th) should be recorded in writing under their hands; accordingly, by instrument in writing, bearing date the 15th of February, 1931, and executed under the hand of each of them, the said Antonio Apicella, Matteo Costantino, and Emilio Scala, it was agreed by and between the said Antonio Apicella and Matteo Costantino and Emilio Scala that they would share equally all the gains and profits to accrue in the said Sweepstakes from the purchase, acquisition or ownership of any one or more of the tickets bearing the distinguishing letters and numbers C/JK 22453 to 22464, and C/JK 22465 to 22476, and the ticket bearing the distinguishing letters and number F/MH 22370.

(b) Alternatively.

(i.) The plaintiffs repeat paragraph 19 (a), but say that the said instrument does not represent the true intention and agreement of the parties thereto.

(ii.) The said intention and agreement was that the distinguishing letters and numbers of the 24 tickets comprised in the two books of tickets purchased by the said Emilio Scala in pursuance of the second verbal agreement for the joint account of himself and the said Antonio Apicella and Matteo Costantino should (as well as the outstanding ticket) be specified in the said instrument as the subject of the agreement of the parties.

(iii.) The distinguishing letters and numbers of the said 24 tickets were F/MH 22369 to 22380 and F/MH 22381 to 22392, and therefore included the aforesaid ticket bearing the distinguishing letters and numbers F/MH 22370.

(v.) In the course of the writing of the said instrument and before the distinguishing letters and numbers of any tickets were written therein the said Emilio Scala verbally represented to the plaintiffs for the purpose of record in the said instrument that the distinguishing letters and numbers of the said 24 tickets were C/JK 22453 to 22464, and C/JK 22465 to 22476.

(ix.) (a) The plaintiffs say it would be inequitable and contrary to good faith for the said Emilio Scala to profit at their expense by reason of his said untrue statement;

(b) in the alternative the plaintiffs say that the said Emilio Scala made the said statement by mistake and that they, the said Antonio Apicella and Matteo Costantino and the said Emilio Scala, executed the said instrument under a common mistake as to the correct distinguishing letters and numbers of the said 24 tickets; (c) in the further alternative the plaintiffs say that the said Emilio Scala made the said statement fraudulently, either well knowing the same to be false or recklessly and not caring whether it were true or false, and with the intention of inducing the plaintiffs to execute the said instrument with incorrect letters and numbers written therein as the distinguishing letters and num-

bers of the said 24 tickets in lieu of the correct letters and numbers distinguishing the same.

On these facts the plaintiffs claimed (1) A declaration that ticket No. F/M.H. 22370 in the Irish Free State Hospitals Sweepstake on the Grand National and the prize payable in respect thereof is held in common in equal shares by each of the plaintiffs and the defendant Emilio Scala:

(2) A declaration that the defendant Emilio Scala holds the said ticket No. F/M.H. 22370 and entered into the contract with his co-defendants constituted by the purchase and holding of the said ticket as trustee as to two-third share therein for the plaintiffs:

(3) If necessary, rectification of the said instrument in writing, dated the 15th of February, 1931, by the deletion therefrom of the words and figures "C/J.K. 22453 to 22464" and "C/J.K. 22465 to 22476" appearing therein, and by the insertion therein, in lieu of the said words and figures of the words and figures "F/M.H. 22369 to 22380 and F/M.H. 22381 to 22392".

(4) An order that the defendants other than Emilio Scala do pay the prize payable in respect of said ticket to the plaintiffs and the said defendant Emilio Scala in proportions of their respective interests therein: and

(5) A declaration that the defendants other than Emilio Scala hold the prize-money in respect of said ticket or the proceeds of any sale thereof as

trustees for and on behalf of each of the plaintiffs and the defendant Emilio Scala in equal shares.

In his defense, the defendant Emilio Scala denied that any agreement was drawn up or entered into on the 15th February, 1931, as alleged in Paragraph 19 (a) of the Statement of Claim, and pleaded as follows:

Paragraph 39. As a further defense to Paragraph 19 (a) of the Statement of Claim, this defendant says that two books each of twelve tickets bearing the distinguishing letters and numbers of C/J.K. 22453 to 22464 and C/J.K. 22465 to 22476, respectively, were purchased for the joint account of the plaintiffs and this defendant, and that by an instrument in writing bearing date the 5th day of February, 1931, and executed under the hand of each of them the plaintiffs and this defendant, it was agreed in manner in the said instrument, appearing namely as follows:

8 Gilbert Street,
Museum Street,
Holborn, W. C. 1,
Feb. 5th, 1931.

We the undersigned agreed to share equal all the moneys of the Irish Sweepstake, The Grant National—March 27th, 1931, numbers following C/J.K. 22453 to 22464, C/J.K. 22465 to 22476.

(Signed)
APICELLA ANTONIO
M. COSTANTINO
E. SCALA.

Paragraph 40. At some date unknown to this defendant but subsequent to the said 5th day of February, 1931, the following words and figures, namely, "and also ticket number F/M.H. 22370" were fraudulently and falsely interpolated in and added to the instrument referred to in Paragraph 39 of this defense without the knowledge, consent, or approval of this defendant, and the date of the said instrument was fraudulently and falsely altered from "Feb. 5th, 1931" to "Feb. 15th, 1931" by interpolating and inserting the figure "1" immediately after the word "Feb." and immediately in front of the figure "5" without the knowledge, consent, or approval of this defendant.

Paragraph 41. This defendant says that the instrument alleged in paragraph 19 (a) of the Statement of Claim falsely and fraudulently altered as hereinbefore alleged is one and the same instrument as the instrument referred to in Paragraph 39 of this defense which has been fraudulently and falsely altered as aforesaid.

It was agreed by the parties that the facts should be found by the trial judge, before any legal argument should be addressed to the Court. In the course of his findings of fact, his Lordship said:

> ". . . I hold that the number of the winning ticket was inserted some time after the result of the draw was known.

"I must now turn to the second branch of the case—the question of whether there was a verbal agreement on which the plaintiffs can maintain this action. Fortunately, on this issue I am not confronted with a mass of conflicting evidence. On the one side I have nothing to deal with but Mr. Scala's point-blank denial that he ever mentioned anything about an extra ticket or about a book of tickets in his own name. As I have already stated, he evidently, to escape from a difficulty, said that he had mentioned having bought a book of tickets for relatives. But about the book in question he swore he said nothing, and so the plaintiffs were quite in the dark as to when the extra ticket was purchased. Now, as I have already pointed out, it is clear that when the number of the winning ticket was added it must have been known to the plaintiffs that the ticket was purchased before the 15th February. Hence, the facts clearly corroborate the plaintiffs' story to the extent of there having been some mention of an extra book of tickets or an extra ticket, and Scala's one piece of evidence goes out and the plaintiffs' story is left with nothing against it. But in considering the plaintiffs' evidence I must allow for the fact that their testimony is to a certain extent discredited by the fact that I have found that the number of the winning ticket was added after the draw, and that, consequently, they have made untrue statements on that one point.

But as regards the rest of their evidence they seem to me to have been in general very accurate—and, indeed, that was one reason why I found it so difficult to reject their evidence as to the added number. Besides, while it is apparent that Scala concentrated on denying anything that would support a case for a verbal agreement, the plaintiffs evidently thought that their case depended on the written agreement, and were never in their evidence taking pains to build up a case on a verbal agreement, and important points in their favor only came out casually.

"Now first of all I must hold, as against the plaintiffs, that there was no binding agreement between them and Scala that no book of tickets was to be bought outside the joint adventure by any of the three. Consequently, any book or ticket which was brought into the joint adventure had to be brought in by special agreement. But, in order to explain the conduct of the parties and how, after the purchase of the first three books comprised in the first written agreement, other books came to be added and why Scala was so secretive about some books which he purchased, I should say that I think there is no doubt that the plaintiffs would have regarded a secret purchase as not playing the game, and that Scala thoroughly understood that. This peculiar outlook is difficult to explain, but people do not engage in these joint

gambling adventures without some very irrational motives about luck, and what breaks one's luck and so forth. Besides, behind these peculiar joint adventures there is the operation of a social or club instinct. The combination of three friends in the purchase of a large holding in the Great Sweepstake of which everyone was talking, appealed to this instinct. They were great persons, the three of them together, and the joint adventure cemented the bond of friendship. An independent purchase would be a violation of the spirit of the adventure. In this connection, it must be remembered that the plaintiffs had previously joined in another sweepstake and had won a prize of £500. On that occasion there had been no written agreement, and I have no doubt that the plaintiffs are accurate in saying that they were not anxious for a written agreement and that Costantino in fact disliked the idea. But Scala was much more business-like in his ideas. It is also to be noted that he was the most ambitious of the three in the number of tickets he desired to acquire, and, in fact, he procured two entire books that are clearly outside the joint adventure—although it would not appear that he was as well off as either of the others, certainly as Apicella.

"That being the position, three books were acquired for the joint adventure on the 8th January, and they were the subject of the writ-

ten agreement of that date. On the 15th January the three went to the bank and obtained an address which would enable more tickets to be obtained. It was arranged that two more books were to be purchased, and it was agreed that Scala was to write for them. On the same day Scala and Apicella procured the four tickets through Gonligardi. Two of them were by arrangement taken by Scala for his wife, the other two by Apicella, one for his wife and one for Mrs. Costantino. Scala wrote for the two books of tickets, as arranged, and paid for them. I hold that he then raised the question of selling some of the tickets to his friends or relatives, and that it was objected that the two books were for the partnership and that if he wanted to sell any tickets to friends or relatives he should procure another book, and that he was to be at liberty to sell any he desired out of that book and that any not so sold were to be taken up by the partnership. I hold that Scala agreed to this, and that the meaning of the arrangement was that the book was to be procured on behalf of the joint adventure, Scala having the right of disposal mentioned. The meaning of this arrangement was that the joint adventure would get the benefit of two free tickets, or the purchase money paid for them, together with the seller's rights in respect of the whole book, and, on the other hand, that the partnership would take up any unsold tick-

ets so that the benefits arising from the acquisition of an entire book would be secured. Scala accordingly wrote for and procured, not one, but two more books. It was these two last mentioned books which he produced and it was they that were included in the second written agreement. Of the first two books procured he disposed of eight tickets to his relatives, the other he purchased in his own name. He only informed the plaintiffs that he had procured one extra book, and he represented that he had sold all but one of the tickets. I hold that he consented that this remaining ticket should be comprised in the agreement, and the parties settled betweeen themselves as to the 10/- in respect of the other free ticket. It would seem that when it was agreed that the one remaining ticket should be comprised in the agreement the seller's rights were not specifically mentioned in either of the written agreements.

"Counsel for the plaintiffs will, presumably, contend on the facts as found, the agreement as to an extra book of tickets, and a particular unsold extra ticket, was an agreement that covered the whole book of tickets which included the winning ticket. That, however, is a question as to which I have not yet given any consideration."

Gavan Duffy, K. C. (with him Finlay, K. C., and Kathleen Phelan), for the plaintiffs.

Scala bought either as partner, co-adventurer or agent of the plaintiffs, and an agent cannot profit in any way from a transaction of this kind. By the principal verbal agreement the parties agreed to buy books of tickets jointly. Scala got two books in pursuance of this agreement and the plaintiffs refused to let him part with those two books. Their property in the books could not be divested by Scala's mistake in putting other numbers into the written agreement without the plaintiffs' knowledge. The plaintiffs by further verbal agreement indemnified him as to one of the two books of the F. M. H. series, and in so far as that one is unidentified through the negligence of Scala, they are entitled to the benefit of both, and Scala is bound to account: Partnership Act, 1890, sec. 29; Fawcett v. Whitehouse 1 R & M. 132 at 147; Taylor v. Salmon, 4 Mly. & Cr., 134; Shallcross v. Oldham, 2 J. & H., 609 at 615; Chattock v. Muller, 8 Ch. D 177 at 181, and Kuhlirz v. Lambert, (1913), 108 L. T. 565, in which Scrutton, L.J., at p. 567 states the general principle as to agents' profits.

A lottery ticket is as specific as land. There was an appropriation of specific tickets to the contract between the plaintiffs and the defendant Scala. Miller v. Race, (1758), 1 Burr. 452 at 457, Cassaboglon v. Gibb, 11 Q.B.D. 797 at 806.

With regard to the position under Irish law, the Gaming Acts have nothing to do with this case.

The Public Charitable Hospitals (Temporary Provisions) Act, 1930, was passed ex abundante cautela. The construction placed in Ireland on the Gaming Act, 1845, sec. 18 makes it clear that the plaintiffs are entitled to recover their prize in this action, even had the Act No. 12 of 1930 never been passed. The prize was given in a lawful game. Further, they could have sued in the English Courts, had the trustees beeen willing to appear and accept the jurisdiction, and recovered the prize there: Irwin v. Osborne (1856), 5 I. C.L.R., 404 at 406; Crofton v. Colgan, (1859), 10 I.C.L.R., 133 at 137.

In this case there was no wager between the Plaintiffs and the Committee of the Sweepstake: Reg. v. Hobbs [1898] 2 Q.B., 647 at 655.

An agreement to subscribe to a Sweepstake is not a wager: Weddle, Beck and Company v. Hackett [1929], 1 K.B., 321 at 329; Earl of Ellesmere v. Wallace (1929), 2 Ch. 1; Monro v. Kelly, (1911), 45 I.L.T.R., 179.

Neither wagers nor sweepstakes were illegal at Common Law, and it is not sufficient for the defendant Scala to show that Lotteries are illegal. He must produce a specific enactment rendering illegal what has been done here: Jenks v. Turpin, 13 Q. B. D., 505 at 526.

All the old Lottery Acts starting in 1698, were passed for Revenue purposes to protect State Lotteries, and are not to be taken cognisance of by other countries. Being territorial, this lottery legislation only applies to things done in England, un-

less it is otherwise expressly stated: Martin v. Benjamin [1907], 1 K. B. 64 at 67; Moulis v. Owen, [1907] 1 K. B. 746 at 764; Bottomley v. Director of Public Prosecutions (1915), 84 L.J., K.B. 354 at 356; Macnee v. Persian Investment Corporation, 44 Ch. D. 306 at 312.

In the 18th century England Ireland was not regarded as a foreign country, and the word "foreign" in such an English Act is not to be construed as including Ireland. cf. in re Campbell (1920), 1 Ch. 35. It was not suggested that Ireland could be treated as foreign in Rex v. Registrar of Joint Stock Companies (1931), 2 K. B. 197.

The alleged illegality if no defence even under English law in an action by the Plaintiffs against the recipient of money to the Plaintiffs' use on an implied promise to pay: Tenant v. Elliot (1797), 1 B. & P. 3; Farmer v. Russel, (1798), 1 B. & P. 296 at 299; Nicholson v. Gooch, (1856), 5 E. & B. 999 at 1016; Sharp v. Taylor, 2 Phillips, 801; Sykes v. Beadon, 11 Ch.D. 170; Smith v. Anderson, (1880), 15 Ch. D. 247; Bridger v. Savage, (1885); 15 Q.B.D. 363; De Mattos v. Benjamin, 63 L.J., Q.B. 248; Hale v. Hale, 4 Beven 369.

The Defendant Scala is estopped by his conduct from pleading English law in the present case: Birkinshaw v. Nicholl, 3 App. Cas. 1004 at 1026.

A Court of Equity will not allow the law of another country to be involved for the purpose of doing injustice between man and man: Cranstown v. Johnston (1796), 3 Ves. 170; judgment of Sir Rich-

ard Alden at p. 183; Mercantile Investment and General Trust Company v. River Plate Trust Loan and Agency Company (1892), 2 Ch. 303 at 313.

The penal laws of another country cannot be involved to deprive a man of his right to property: Folliott v. Ogden, 1 H. Bl. 123 at 125; 126 E.R. On appeal the judgment in that case was affirmed on different grounds, but the same principle was enunciated: Ogden v. Folliott, 3 Term. Rep. 726 at 733.

The proper law of the contract is the law of Soarstat Eireann, and not the law of England, and the place where accounts were to be settled is immaterial: Westlake 7th Edn. pps. 299, 302 and 304; Robinson v. Bland, (1760), 2 Burr. 1077; British South Africa Company v. De Beers Consolidated Mines Limited (1910), 1 Ch. 354 at 383; Saxby v. Fulton (1909), 2 K.B. 208, 232; Spurrier v. La Cloche (1902) App. Cas. 446 at 450.

The dictum of Lord Halsbury in Re Missouri Steamship Company (42 C.D. 321 at 336), stated by Professor Dicey with a query (Dicey "Conflict of Laws," 4th Edn. Rule 160, Exception 2 at p. 616), against enforcing a contract made contrary to the positive law of the country where it was made does not apply, because there is no law forbidding subscription to this sweepstakes: in any case it goes too far. cf. Van Grutten v. Digby, 31 Beav. 561; Re Banks (1902) 2 Ch. 333.

Wood, K.C. (with him Fitzgerald, K.C., and Nolan Whelan) for the defendant Scala:—

A joint ownership cannot exist where one only of the partners buys and pays. In this case Scala bought the book containing the winning ticket for himself, and forwarded his own cheque along with the counterfoils to the Sweepstake headquarters in Dublin, and the plaintiffs had no part in the transaction.

A promise to give a chattel, such as a horse, watch or ticket unaccompanied by transfer or change of possession, as in the present case, is a mere nudum pactum and cannot be enforced by compulsion of law. Scala did not identify the tickets, nor appropriate them to any contract between himself and the plaintiffs, and there was no onus on him to appropriate. Seath v. Moore, 11 App. Cas. 350 at 370; Wait v. Baker, 2 Exch. 1 at 7; Ridgway v. Ward, 14 Q.B.D. 110 at 118; Noblett v. Hopkinson (1905) 2 K.B. 214 at 218, 221; Milroy v. Lord, 31 L.J. Ch. 798 at 802.

Every contract founded on mutual promises between persons must be obligatory on both parties so that each could maintain an action on it or neither would be bound; for the mutuality of obligations is the very essence of all contracts based on mutual promises. Scala could not have maintained an action against the plaintiffs for a contribution to the purchase price of the book of tickets, and this action against him cannot be main-

tained. Crow v. Edwards, Hobarts Reports 6; Holt v. Ward, 2 Strange 937.

The consideration on which a contract is based which gives a right of action must move from the plaintiff. The plaintiffs gave no consideration for Scala's agreement to include the outstanding single ticket in the joint adventure, and they cannot maintain an action on foot of that agreement.

The consideration for any contract must be of some value in the eye of the law and must be legal. Dew v. Director of Public Prosecutions (1921), 124 L.T.R. 246; Ranson v. Burgess, 43 T.L.R. 561; Hall v. McWilliam, 85 L.T.R. 239; Rex v. Smith, 4 Term Rep. 414.

Even if there was valuable consideration here, it was certainly not legal. Gorenstein v. Feldmann, 27 T.L.R. 457.

It was a crime because it was the publication of a proposal in respect of a lottery, making known to each other the existence of the lottery, and proposing to join in a joint adventure in connection with it. This is a criminal act, not only in respect of England, but in respect of this country. Lockwood v. Cooper (1903) 2 K.B. 428; Diggle v. Higgs (1877) 22 Ex. D. 422, C.A. at 426.

The fact that the enterprise and pastime are both lawful does not change the nature of the wager.

A sweepstake in which the winner is determined by lot or chance is a lottery. Allport v. Nutt (1845) 1 C.B. 974; Gatty v. Field (1846) 9 Q. B. 431.

The trustees are stakeholders only and there is no privity between them and the plaintiffs. Jones v. Carter (1845) 8 Q. B. 134.

With regard to the plaintiffs' claim for rectification, the only claim they can possibly make is the rescission on the ground of mistake, but they are not entitled even to rescission because the mistake, if mistake there was, was a unilateral one and not a mistake common to all parties. Murray v. Parker (1854) 19 Bev. 305 at 308; In re International Contract Company (1892) 7 Ch. App. 485.

Lavery, K.C. (with him MacFhionnlaoich), for the other defendants.

Finley, K.C., in reply:—

The mutual relations between the partners imports consideration. There was an agreement by each party to subscribe capital. Lindley on Partnership, 9th Edn., pps. 51, 72 and 86. The mere agreement was consideration and made a binding agreement as from that date.

There was an appropriation of the two books of the F./M.H. series to the original contract. Seath v. Moore (11 App. Cas. 350) and Wait v. Baker (2 Exch. 1), are both cases of an appropriation under the Sale of Goods Act, 1893, and have no application to the present case. A distinction must be drawn between appropriation in such cases and appropriation by an agent on behalf of a principal, which is this case.

In the case of a partnership, where any one partner performs certain acts on behalf of the partnership, he does so as agent. Partnership Act, 1890, sec. 5. The appropriation here is governed by Cassaboglon v. Gibb (11 Q.B.D. 797), and the case of Millar v. Race [(1758) 1 Burr. 45] already quoted is unanswerable. Benjamin on Sale, 6th Edn. p. 384. A relevant authority on the question of election is Scarf v. Jardine, 7 App. Cas. 345 at 360.

Accretions to property attach to the ownership of such property. Benjamin on Sale, 6th Edn. p. 451; Meares v. Collis [1927] I.R. 397 at 403. The plaintiffs would be entitled, if necessary, to rectification. Lindley on Partnership, 9th Edn. p. 389; Kerr on Fraud and Mistake, 6th Edn. p. 497; Union States of America v. Motor Trucks Limited [1924] A.C. 196 at 198; Corley v. Stafford; and Campbell v. Corley, 5 W. R. 646: 44 E. R. 714 at 719.

Also cited: Lovesy v. Smith, 15 Ch. D. 655 at 662; Clerk v. Girdell, 7 Ch. D. 189; Beale v. Kyte [1907] 1 Ch. p. 564 at 566; Sharp v. Taylor, 2 Phillips 801.

Meredith, J.:—I am now in a position to deal with the various questions of law that arise on the facts which I have already found and on any supplementary findings at which it was necessary to arrive.

The Hospital Sweep tickets which the Hospitals Trust, Limited, scatter broadcast over the world

are not to be regarded, in my opinion, as offers to each person into whose hands they may find their way to become a purchaser of the right to have the corresponding counterfoils included in the draw on forwarding the counterfoils and the price of the tickets. If a ticket coming into the hands of a person in England constituted such an offer, the posting in England of the counterfoil and the price of the ticket would constitute a binding contract, and a contract which would be made in England. The ticket is a very useful protection to the purchaser of certain rights, which are defined by reference to the number on the ticket, which correspondents with that on the counterfoil. The ticket is not an offer. It, with the attached counterfoil, is more like a proposal form, and an offer is first made by forwarding the counterfoil with the price of the ticket, the ticket being retained by the purchaser. If the offer is accepted the price of the ticket is retained and an official receipt is forwarded, the contract is thus concluded, and it is one made in Saorstat Eireann. But the offer might be refused. For instance, the number of tickets sold might so exceed expectations that it might be thought advisable not to accept any counterfoils after a date some days earlier than had been announced. Or, if the transmission of the counterfoils was illegal in a particular country, and if the encouragement of breaches of the law in that country were resented, the Manage-

ment, Committee might decide to refuse all counterfoils transmitted from that country. Also, the rights secured by the acceptance of the offer to subscribe, followed by success in the draw, are not secured by ownership of the ticket as a mere bit of paper, but by the purchaser as a subscriber, and the particular subscriber whose name appears on the counterfoil that has drawn a horse. It is quite intelligible to speak of buying or selling a ticket in the sweepstake, but the expressions are loose expressions for what is really much more.

Such being the transaction in which the purchaser of a ticket or book of tickets engages it is not difficult to understand the nature of the so called joint adventure upon which the plaintiffs and the defendant, Scala, at the outset alone intended to embark and the precise matters in respect of which they definitely intended to enter into a binding contract. The joint adventure consisted in the joint purchase in equal shares of books of tickets, the counterfoils attached to which might only be filled with one of their names. Then they definitely intended to contract in respect of any prize-money that might be won in respect of any ticket included in such joint purchase. The two written agreements express contracts of this kind and show clearly what was in the minds of the parties. But where a transaction, which is intended to issue in or be consummated by a binding contract, is carried out by a series of intermediate steps that have to be arranged or agreed upon as

the transaction progresses, a difficult question may easily arise. Does a stated agreement or unanimity as to some intermediate step, or a decision to take such a step, with a view to putting the parties in a position to enter into the binding contract, which is the goal of the whole transaction, itself constitute a preliminary or intermediate contract binding on the parties, or is it a mere revocable step towards the contemplated contractual position? Do the parties intend during the progress of the transaction to dig themselves in by means of successive contractual entrenchments, and consolidate their advance as a decision is reached on this or that intermediate step? That may be a difficult question to decide on the facts of any particular case. In the present case, when the parties left the bank on the 15th January, after having ascertained that they would have to write to Dublin for books of tickets, the question of the number of books intended to be purchased naturally arose. It was arranged that two more books were to be purchased, and it was agreed that Scala was to write for them. When the books were obtained it would certainly be open to any of the parties to raise some objection to the two particular books procured, as, for instance, on the ground that they were unlucky for this or that absurd reason. So there would still have to be the final contract, in respect of two definitely approved books, on the lines of the written agreement in fact subsequently entered into, which, like the written agreement of 8th Janu-

ary, set out the numbers of the tickets. Did the parties intend in the meantime to enter into a binding contract that there was to be a joint purchase at all events of some two books? If there was an intention to exchange mutual promises and definitely to contract, then I see no difficulty in finding good consideration. But in my opinion there was no intention to contract. The parties did not mean to bargain; they merely arrived at a conditional or revocable decision for the guidance of the person who was to write to Dublin for books of tickets. Why the parties were so particular on this and other occasions about only writing for the precise number of books they thought they would require I do not know; but probably they thought that the more books sent the greater the chance of detection and interception. But, as their procedure was only to ask for as many books as they thought they would require it is easy to understand how they might discuss how many books were to be purchased without intending to bind themselves by a contract. The position is analogous to the common case of agreements between a vendor and a purchaser, say as to the price of a house, where it is made clear that everything is subject to a formal contract to be prepared by the respective solicitors.

Mr. Gavan Duffy and Mr. Finlay, in their extremely able arguments for the plaintiffs, strenuously maintained that the arrangement arrived at on leaving the bank to purchase two books of

tickets was a definite contract between the parties. Here I may recall the fact that Mr. Scala, with characteristic foresight, absolutely denied that Mr. Costantino was present when this alleged contract was made, but I have held that that was one of the points on which he was clearly inaccurate. On the basis of this alleged contract counsel built up an ingenious case. They contended that the two books actually procured were appropriated to this contract, so that the contract became one to purchase, not some two books, but those two particular books. This appropriation occurred, when Mr. Scala informed the plaintiffs that he had obtained the two books, and the plaintiffs refused to allow him to sell to his friends or relations any tickets from those two books on the ground that they were for the partnership, and Mr. Scala acquiesced. That being the position, it was contended that the money which the plaintiffs paid on the 5th February was for shares in the tickets in those two books, and that those two books, and not the two books subsequently procured by Mr. Scala, should have been included in the second written agreement, which the plaintiffs say was in fact entered into on the 15th February. Accordingly they pray that the agreement should be rectified by the Court by substituting the numbers of the tickets in the two books intended to be comprised in the agreement in place of those actually inserted. This in effect says, that when the number of the winning ticket was fraudulently inserted at the side of the docu-

ment a blunder was made, owing to the plaintiffs being ignorant of the fact that the winning ticket belonged to one of the two books which they had said were for the partnership, and that the Court should now rectify the mistake—a most unfortunate mistake, but for which the plaintiffs would not have had occasion to commit any fraud at all. I always try to appreciate the points of view of litigants on both sides, and I quite understand how the plaintiffs feel doubly aggrieved by reason of the fact that Mr. Scala not alone induced them by misrepresentations to agree to the insertion of the wrong numbers into the agreement, but betrayed them into committing a most regrettable fraud. However, there is a principle that a person coming into equity should come with clean hands; and I consider that the standard of cleanliness required by these Courts is more exacting than what the humble prayer of the petitioners seems to imply. Further, I think that on plaintiffs' contention their claim should rather be for rescission on the ground of misrepresentation than for rectification. But it is not necessary to sidetrack the plaintiffs on any of these technical points. For, first of all, the ground is cut from under the plaintiffs' feet by my decision that the arrangement as to purchasing two books was not a contract. Secondly, if it were a contract for some two books, that contract was certainly discharged by the joint purchase of the two books to which the agreement of the 5th or 15th February was expressed to re-

late, unless there had been appropriation of the two books first procured to that contract. I hold there had been no such appropriation. For the mere refusal of the plaintiffs to allow Mr. Scala to dispose of one of the two books that had been procured, and which would presumably be required for the contemplated transaction, was not a determination that the transaction should relate to those two particular books in any event.

The plaintiffs also sought to establish a title to the book containing the winning ticket on the strength of what was referred to as the third verbal agreement. By this agreement the scope of the original adventure was extended. This was the verbal agreement in pursuance of which Mr. Scala was alleged to have consented to allow the number of what proved the winning ticket to be inserted into the margin of the second written agreement. I may refer to my previous findings in respect of that agreement.

> "Scala wrote for the two books of tickets, as arranged, and paid for them. I hold that he then raised the question of selling some of the tickets to his friends or relatives, and that it was objected that the two books were for the partnership, and that if he wanted to sell any tickets to friends or relatives he should procure another book, and that he was to be at liberty to sell any he desired out of that book and that any not so old were to be taken up by the partnership. I hold that Scala agreed

to this, and that the meaning of the arrangement was that the book was to be procured on behalf of the joint adventure, Scala having the right of disposal mentioned. The meaning of this arrangement was that the joint adventure would get the benefit of two free tickets, or the purchase money paid for them, together with the seller's rights in respect of the whole book, and, on the other hand, that the partnership would take up any unsold tickets so that the benefits arising from the acquisition of an entire book would be secured. Scala accordingly wrote for and procured, not one, but two more books. It was those two last mentioned books which he procured and it was they that were included in the written agreement."

It is easy to see that in respect of the more complicated arrangement under this third verbal agreement it was necessary to operate on a contractual basis from the start. It could not be left open to Mr. Scala to wait until he saw how many tickets he was able to dispose of, and if he could only dispose of a few, say he was dealing with the book for the partnership, which would then be liable to take up a number of unsold tickets, but if he was able to dispose of most of the tickets, say he was operating on his own account, and take the benefit of the two complimentary tickets. The moment a ticket from one of the two books was sold the book was appro-

priated to the contract. Accordingly I hold that the book of the F/M.H. series out of which Mr. Scala had disposed of eight tickets were appropriated to the agreement, and if one of the four tickets which Mr. Scala had taken out in his own name had proved the winning ticket it seems to me that the plaintiffs would have had a good claim. Those four tickets should in fact have been brought in to the second written agreement. But I fail to see how the third verbal agreement could be made the basis of a claim to the book containing the winning ticket.

A further contention went to the root of what the plaintiffs probably most acutely felt to be their grievance. The two books of the F/M.H. series were procured for the partnership and the plaintiffs refused to allow Mr. Scala to dispose of them. They were the property of the partnership, and the plaintiffs' rights could not be divested by Mr. Scala procuring two other books of tickets and including them in the second agreement. The plaintiffs had a right to be told that Mr. Scala still had two books on hands belonging to the partnership. If they had been told this they would probably have said that if Mr. Scala desired to purchase them they would have joined in the purchase. Mr. Scala was only able to claim the prize-money because he had dealt with their joint property on his own private account. The benefit he derived from the use of their property was, it was contended, the natural benefit to be expected, or at least hoped for, from such use.

Counsel referred to sub-section (1) of Section 29 of the Partnership Act, 1890, which provides that:

> "Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business."

Counsel cited numerous authorities, but they did not throw much light on the question of whether the benefit in the present case could be said to be derived from the use of the partnership property. Taylor v. Plumer (3 M. & S., 562) seems more in point. In that case Lord Ellenborough, C.J., said: "An abuse of trust can confer no rights on the party abusing it nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect of the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is michievous in principle, and supported by no authorities of law."

That case only shows that it is not a relevant argument to say that when Mr. Scala took two books of tickets in his own name that he had no authority and that he could not have bought them without being authorised by Apicella. That is neither here nor there. Whether Mr. Scala had authority or not

if benefit was derived from that purchase the absence of authority does not constitute the dividing line or break the chain of derivation of profit.

In Walton v. Butler (29 Beav. 428), a ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt. It was held that the firm had no interest in the ship, or any lien on it for the amount of the purchase money. Sir John Romilly, M.R., held that the ship was not partnership property in fact, but the following passage shows what would have been his view of it had been partnership property:

> —"I at first supposed that this was a partnership chattel, though registered in the name of one partner only, in which case I should have been strongly inclined to think that the plaintiff would have been entitled to follow it."

The plaintiffs thought they could follow their counterfoils into the draw, and follow the winning counterfoil until it was drawn from the big drum and made Mr. Scala the winner of the first prize. The plaintiffs seem to look on the ticket as something fated to win, and they seem to think that Mr. Scala, when he used the counterfoil, appropriated the partnership fate to his own account.

Now, to begin with, I must hold that the book of tickets which contained the winning ticket was, as a mere chattel, the property of the plaintiffs and the defendant, Scala. Also it had some value, since the first three books had to be purchased at a premium

of 10/- each. If someone who had found it difficult to procure a book had paid Mr. Scala 10/- for the book, Mr. Scala would have had to account for that profit. Also, Mr. Scala did not derive the benefit of the prize from the use of the book, as the plaintiffs say, containing the winning ticket, but by chance—a chance which he obtained as a subscriber to the Sweepstake. The chance of the draw, purchased by Mr. Scala on his own account, broke the chain of derivation from the use of the book. The plaintiffs might as well say that if a firm owned a garage, and a member took a car belonging to the firm to drive to the Curragh Races, and at the races won a hundred pounds by a bet on a horse, he would have to account for what he won if he could not have got to the races without using the car. But the hundred pounds would be derived from the bet, not from the use of the car. Similarly, as the ticket itself cannot be regarded as something fated to win, Mr. Scala did not derive his title to the prize-money from the use of the ticket, but by chance and as a subscriber to the Sweepstake. It is not possible to trace to any particular causal origin what blind chance draws from the shuffle of the big drum. Hence the bare ownership of the book of tickets as a chattel in no way entitles the plaintiffs to share in the prize-money.

Although the plaintiffs are not entitled to any share of the prize-money, it would be open to me to make the declaration sought as to the ownership of the chattel considered as a mere chattel. The

matter is entirely one of discretion, as the parties were certainly co-owners of that bit of paper. Having regard to the defendant Scala's strenuous denial that the book was procured for the partnership, and his denial of the third verbal agreement, and, as he should not have used the book that was joint property without giving the plaintiffs the opportunity of coming in, I would be inclined to make the declaration. But, as the plaintiffs had only sought the declaration with a view to enforcing a certain contract, I would decline to make the declaration, if the contract was one that could not be enforced having regard to the Lotteries Acts.

The first question to be determined is whether the contract in question is governed by the law of England or that of Soarstat Eireann. In the argument at the hearing, contracts between the plaintiffs and the defendant Scala were not, I think, sufficiently distinguished from contracts between either the plaintiffs or the defendant Scala with the Management Committee in reference to the purchase of tickets. The latter contracts were, as I have held, concluded in Saorstat Eireann, and obviously contemplated the application of the Saorstat Eireann law, and consequently were Soarstat Eireann contracts. But that did not make every contract between parties in respect to these Sweepstake contracts Saorstat Eireann contracts. It would not, for instance, make the contract between Mr. Scala and Mr. Bendir, under which Mr. Scala disposed of

three-quarters of his ticket, a Saorstat Eireann contract. Then, the written agreements between the plaintiffs and the defendant Scala do not immediately suggest anything that to my mind makes it clear that Saorstat Eireann law was in contemplation.

In this connection it must be remembered that the mere fact that something to be done under the contract would be legal in Saorstat Eireann but illegal in England is not sufficient to show that the parties intended the contract to be governed by the law of Saorstat Eireann. It is therefore necessary to consider the precise contract in question. Having regard to my findings, I think that the contract in question should be taken to be the contract, called the third verbal agreement, as to an additional book out of which Mr. Scala might dispose of as many tickets as he desired to his friends and relatives, and the residue were to be taken up by the three co-adventurers. I have held that the book of the F/M.H. series of which Mr. Scala disposed of eight was appropriated to this contract. Was, then, the contract in reference to this book one that contemplated English or Saorstat Eireann law? This precise question was not argued at the hearing, but it seems to me to have been assumed on both sides that the contract had reference to Saorstat Eireann law. But I do not see that the fact, that what was to be done by Mr. Scala would acquire rights for the benefit of the partnership under a contract between him and the Managing Committee that would be a

Saorstat Eireann contract, has much bearing on the contract between the plaintiffs and Mr. Scala. This contract was made in England, and the precise acts to be performed by Mr. Scala, in pursuance of the contract, as well as any payment by the plaintiffs, were all acts to be performed in England. Consequently, unless there is some strong countervailing reason, I think the contract should be regarded as an English contract. (See In re Missouri Steamship Co., 42 Ch. D. 321). But as there are considerations that could be urged on the other side, and as it seems to have been assumed that the contract was a Saorstat Eireann contract, I shall deal with the question on that basis.

The broad question then is: Will the Courts of Saorstat Eireann enforce contracts which are to be performed by breaking the laws which other countries have found it expedient to make in the interests of good government? Every civilised country has a right to work out the problem of good government within its own territory in its own way—and God knows it is a sufficiently difficult problem. The whole world is today groaning under the weight of that problem. Are our Courts to respect the efforts of such other countries to discharge their duty, or are they to be made the instrument of subverting such efforts? To my mind only one answer is possible to that question. Our Courts will not enforce such contracts except where they have in any case been expressly validated by our legislation.

It is hardly necessary to point out that it was presumably because the plaintiffs knew that the contract which they were seeking to enforce could not be enforced in England, because of the illegal acts to be performed under it, that this action was brought in these Courts, and it is obvious that if actions of this type can be successfully maintained in this country, Dublin will rapidly become the gambler's cockpit of Europe. I see nothing in the Public Charitable Hospitals (Temporary Provisions) Act, 1930, to encourage the idea that such a result was intended. Hence, if we desire to be cosmopolitan, let us be so by paying a cosmopolitan regard to the principles of international law.

The contract that the plaintiffs had sought to enforce was one the primary object of which was to secure for the joint adventure the benefit of the two complimentary tickets to be secured partly by the sale by Scala of tickets to his friends and relatives and also to secure the benefit of the seller's rights in respect to such sales. The book of tickets was to belong to the partnership; and Mr. Scala was to be the agent of the partnership for effecting such sales.

Under Section 41 of the Lotteries Act, 1823, the performance of this contract in the manner contemplated would involve the offence of selling. The King v. Registrar of Joint Stock Companies [1931], 2 K.B. 197. There is in fact abundant evidence that offences under the Act were intended, and that the parties were anxious that every precaution should be taken, not for the purpose of

avoiding infringements of the law, but for the purpose of escaping detection. In Waugh v. Morris (L.R. 8 Q. B. 202), at p. 207, Blackburne, J., said:—

> "We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in Pearce v. Brooks, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in McKinnell v. Robinson, 'for the express purpose of a violation of the law.' . . . We quite agree, that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not."

That the Public Charitable Hospitals (Temporary Provisions) Act, 1930, contains nothing to validate a contract under which the offences mentioned are to be committed seems clear.

Sub-section (3) of Section 3 of the Act only legalises the holding of the lottery. It has in view the provisions of the various Lotteries Acts under which, but for this Act, the holding of the lottery would be illegal. This enactment would not protect things done even in Saorstat Eireann which are illegal under the existing law and not necessary to the holding of a sweepstake in accordance with the provisions of the Act, except in the case of acts which a statute only makes illegal when committed in respect of an unauthorized sweepstake.

It is doubtful if the Act was intended to have any extra territorial effect whatever. The only other provision that might seem relevant is sub-section (5) of Section 4. But it only secures the payment of the prizes to the prize-winners by the trustees in case they are not paid by the Management Committee. There is certainly nothing in this provision to validate contracts that contemplate violation of the laws of other countries. To hold that such contracts will not be enforced by the Courts of Saorstat Eireann is simply to hold that this provision must be allowed to carry the whole burden that it seems to be intended to carry. Indeed, the object of this action was to prevent the immediate operation of this provision by the simple handing over of the prize-money to Mr. Scala. There is certainly nothing in the Act to prevent this simple provision of the Act itself being carried out without further question.

I shall, therefore, decline to make any declaration as to the bare ownership of the ticket on the ground that the declaration was only sought for the purpose of enforcing a contract for the performance in England of Acts in violation of Section 41 of the Lotteries Act, 1823.

My decision on the serious issues of fact in dispute and as to the merits of the case, while it explains the grievances which the plaintiffs felt as to Mr. Scala's unauthorized use of the book of tickets belonging to the three parties, gave Mr. Scala the satisfaction of a finding that the plain-

tiffs had no claim whatever at law or in equity to participate in his winnings. The action must, therefore, be dismissed.

Solicitors for the plaintiffs:—Corrigan and Corrigan.

Solicitors for the defendant, Emilio Scala: Taylor, Son and Robinson.

Solicitors for the defendant Trustees and Committee:—Ruttledge and MacFhionnlaoich.

—The Irish Law Times Reports,
Vol. LXVI, page 33.

I hereby certify that the attached report is a true and correct copy of the report of said case as it appears in The Irish Law Times Reports, Vol. LXVI, at page 33 thereof, published in Dublin, Ireland, by John Falconer.

ORA F. BARNEY.

Subscribed and sworn to before me this 7th day of January, 1941.

VALENTINE BROOKES,
Deputy Attorney General of the State of California.

[Endorsed]: Plaintiff's Exhibit No. 4 for Identification. Filed December 16, 1940. O. E. Benham, Clerk.

[Endorsed]: Filed Jan. 9, 1941. O. E. Benham, Clerk.

In the District Court of the United States of America, in and for the District of Nevada

No. 104

PEOPLE OF THE STATE OF CALIFORNIA on the relation of Charles J. McColgan, as State Franchise Tax Administrator,

Plaintiff,

vs.

JOHN HOWARD BRUCE,

Defendant.

OPINION AND DECISION

Norcross, District Judge.

This is an action to recover an amount of income tax in the sum of $4,345.84, alleged to have accrued in 1937, while defendant and his wife were residents of the State of California, by reason of defendant, then becoming entitled to the sum of $70,000.00, as the proceeds of a winning ticket in the so-called Irish Sweepstakes, payment therefor being subsequently made to defendant in the State of Nevada.

A primary question to be determined is that of jurisdiction. By the pleadings, the question of jurisdiction is presented in a number of respects. The Amended Complaint alleges: "This Court has jurisdiction because this is a controversy between citizens of two states involving an amount in excess of $3,000. Charles J. McColgan is a citizen of the

State of California and defendant * * * a citizen of the State of Nevada. * * * this is an action for taxes. Jurisdiction is founded on section 24(5) of the Judicial Code * * * (28 U. S. C. A. Sec. 41(5). * * * because Article IV, section 1 of the United States Constitution, commonly known as the full faith and credit clause, compels it to exercise jurisdiction." The answer denies these allegations excepting in respect to the citizenship of Charles J. McColgan and defendant.

As having a bearing on the question of jurisdiction, paragraph II of the amended complaint and the answer thereto are, also, here quoted:

> "That Charles J. McColgan is the duly appointed, qualified and acting Franchise Tax Commissioner of the State of California and as such is authorized by law to administer the California Personal Income Tax Act (Statutes of California 1935, page 1090, as amended.)
>
> "That section 28 of said act provides in part as follows:
>
> > 'Foreign Action. The Commissioner may bring an appropriate action (whether in the form of a common law action of debt or action), in any court of competent jurisdiction in the United States or in a foreign country, in the name of the people of the State of California, to recover the amount of any taxes and interest due under this act. The Attorney General or the counsel for the

commissioner of this State must prosecute such action.'

"That Earl Warren is the duly elected, qualified and acting Attorney General of the State of California and as such is authorized by law to prosecute this action, and the State of California is one of the sovereign states of the United States."

The answer thereto reads:

"Defendant admits the allegations contained in paragraph II of the plaintiff's complaint, except that he specifically denies that Charles J. McColgan, as State Franchise Tax Administrator, is authorized by law to prosecute this action. In this connection defendant alleges any and all moneys received by Charles J. McColgan, as State Franchise Tax Administrator, are the property of the State of California, and said McColgan has no right or duty therein, save and except to receive and to keep in his possession moneys for the State of California."

The salient facts of the case are that in the year 1936, while defendant and his wife were residents of the State of California, defendant purchased, from his earnings, a ticket in the Irish Sweepstakes which ticket later drew a horse. Thereafter defendant sold a half interest in the ticket to a New York Syndicate for $5000.00. About May 26, 1936, the race was run and the horse drawn by the said ticket

won first place entitling the holders of the ticket to the first prize of $150,000.00. Payment was not immediately made to defendant for his interest by reason of suit instituted by one William Leathe in Ireland who, also, claimed a half interest in the winings. This case was finally settled by an agreement that an amount be paid to Leathe and his attorneys in the sum of $10,642.84. In May 1937, not later than May 5th, defendant and his wife left the State of California and established their residence in Nevada, since which time, they have continuously so resided and are now such residents.

Defendant, after establishing his residence in Nevada, made arrangements with the First National Bank in Reno to handle the collection of any balance payable on account of said winning ticket. On June 24, 1937, such collection was made by said Bank and the amount thereof $59,356.66, less charges, costs, and an advance of $50.00, theretofore made to defendant, was deposited to the credit of defendant and his wife, the net amount of such deposit being the sum of $59,242.64. In 1938, defendant and his wife each made income tax returns to the United States Collector of Internal Revenue at Reno, Nevada, on one half of the gross returns so received, $29,646.32, and paid the tax assessed thereon.

This case clearly should be treated as a suit brought by the State of California as the real party in interest and not as a suit between citizens of different states. Robertson, State Revenue Agent, v.

Jordan River Lumber Company, 269 Fed. 606; Hertz v. Knudson, 6 F. (2d) 812, 815. This suit being one to recover a judgment for taxes, the recent decision of the Supreme Court of the United States in Massachusetts v. Missouri, 308 U. S. 1, appears to sustain the view that this Court has jurisdiction of the pending action. See, also, Milwaukee County v. White Co., 296 U. S. 268; Hertz v. Knudson, supra. It is the conclusion that this Court has jurisdiction.

The next question presented for determination is the time when defendant became liable to a tax by reason of his ownership in said ticket—did said liability occur while he was a resident of the State of California or not until after he became a resident of Nevada? The income tax law of the State of California follows generally the provisions of the Federal income tax law. It is not contended that the rules applicable to its interpretation would vary from those applicable to the Federal statute, upon the contrary, it is conceded that the construction placed on similar provisions are controlling. In the opinion of the Supreme Court in Helvering vs. Horst, delivered November 25, 1940, 311 U. S. ....., 61 S. Ct. 149, appear the following statements:

> "From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event rather than the acquisition of the right to receive it. And 'realization' is not deemed to occur until the income is paid. * * *.

> "In the ordinary case the taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued. But the rule that income is not taxable until realized has never been taken to mean that the taxpayer, even on the cash receipts basis, who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor."

There is nothing in the case now before this Court which brings it within any exception to the general rule above quoted. There is nothing in this case even remotely suggestive that defendant had "fully enjoyed the benefit of the economic gain represented by his right to receive income" prior to "the receipt of it by the taxpayer." See People v. Rosen, 11 Cal. (2) 147. The rule applicable here is that of "the ordinary case."

Defendant being a resident of the State of Nevada at the time he received payment, he was not liable to any income tax thereon to the State of California. Defendant is entitled to judgment accordingly.

It is so ordered.

Dated this 22nd day of March, 1941.

(Signed) FRANK H. NORCROSS
District Judge

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiff and Appellant, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the court entered herein, designates as the record on appeal the following:

1. The Agreed Statement of the Case, agreed to by the parties as constituting part of the record, and

2. All the proceedings relating to the offer in evidence of the reports of the two Irish court decisions, entitled McKie v. McKie and others, Plaintiff's Exhibit numbered No. 3 for identification, and Apicella and Another v. Scala and Others, Plaintiff's Exhibit numbered No. 4 for identification, including the offer in evidence and the reasons stated, any objections thereto, and the reasons stated, and the ruling of the court thereon, and including also the [2] exhibits themselves, excepting only, in the verified copies substituted for the originals in the case of No. 3, from page 12, line 30 to the bottom of page 15, and in the case of No. 4, from page 14, line 22 to page 21, line 8, inclusive.

Plaintiff and Appellant requests that the clerk of this court cause said record to be prepared and transmitted to the clerk of said Circuit Court of Appeals, as provided in Rule 75 of the Federal Rules of Civil Procedure.

The points on which Plaintiff and Appellant will rely on appeal are as follows:

1. That the court had jurisdiction.

2. That the Personal Income Tax Act of California imposed an income tax on defendant on account of the income concerned herein.

3. That the State of California had jurisdiction to impose the tax.

4. That the tax was due in the amount assessed.

5. That the trial court erred in not admitting in evidence reported Irish decisions as proof of Irish law.

EARL WARREN,
Attorney General of the State of California.
H. H. LINNEY
Deputy Attorney General
VALENTINE BROOKES
Deputy Attorney General
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed July 3, 1941. [3]

Hartford Accident and Indemnity Company
Hartford, Connecticut

[Title of District Court and Cause.]

Whereas, The People of The State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California has appealed to the United States Circuit Court of

Appeals for the Ninth Circuit from a certain judgment rendered against said People of the State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California in said action in the above entitled court in favor of John Howard Bruce and entered herein on March 22, 1941.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact a general surety business in the State of California and in the State of Nevada, does hereby undertake and promise on the part of the People of the State of California on the relation of Charles J. McColgan as the Franchise Tax Commissioner for the State of California, the Appellant, that said Appellant shall pay all costs if the said appeal is dismissed or the said judgment affirmed, or such costs as the appellate court may award if the said judgment is modified, not to exceed the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself bound. [4]

It is further stipulated as a part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment

therefor against said surety and award execution therefor, not to exceed, however, the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at San Francisco, California, this 22 day of May, 1941.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

[Seal] By R. A. VAN HORN
Attorney-in-Fact

The premium on this bond is $10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 22 day of May in the year one thousand nine hundred and 41, before me, Vincent P. Laguens, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared R. A. Van Horn known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and [5] affixed my Official Seal, at my office,

in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] VINCENT P. LAGUENS

Notary Public in and for the City and County of San Francisco, State of California.

My Commission will Expire March 27, 1945.

[Endorsed]: Filed June 13, 1941. [6]

[Title of District Court and Cause.]

ORDER TRANSMITTING SUBSTITUTED COPIES OF CERTAIN PARTS OF THE RECORD TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

It Is Hereby Ordered, pursuant to request of plaintiff and appellant, that the copies of the Irish decisions of McKie v. McKie and Others, and Apicella and Others v. Scala and Others, numbered respectively Plaintiff's Exhibits Numbers 3 and 4, now on file as part of the record of this case in this court, be transmitted by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Circuit, to be included in the record on appeal therein, and that copies of the same need not be made.

Dated: July 15th, 1941.

FRANK H. NORCROSS

Judge, United States District Court for the District of Nevada.

[Endorsed]: Filed July 15, 1941. [7]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

It Is Hereby Ordered, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, that the time for filing the record on appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit, and for docketing the same therein, is extended until August 23, 1941.

Dated this 22nd day of July, 1941.

FRANK H. NORCROSS

Judge

[Endorsed]: Filed July 22, 1941. [8]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the above-entitled case, said case being No. 104 on the civil docket of said Court.

I further certify that this transcript, consisting of 14 typewritten pages and numbered from 1 to

14, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, as set forth in the "Designation of Record on Appeal" filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that, pursuant to order of this Court, a copy of which order is made a part of this transcript, [13] there is accompanying this Record on Appeal the substituted copies of the Irish decisions of McKie v. McKie and Others, and Apicella and Others vs. Scala and Others, numbered respectively Plaintiff's Exhibits numbers 3 and 4, for identification.

I further certify that accompanying this Record on Appeal is the original "Agreed Statement of the Case", agreed to by counsel for both parties and approved by this Court.

And I further certify that the cost of preparing and certifying to said record, amounting to $3.50, has been paid to me by Earl Warren, Esq., Attorney General of the State of California, one of the attorneys for the appellant.

Witness my hand and the seal of said United States District Court this 5th day of August, 1941.

[Seal] O. E. BENHAM
Clerk, U. S. District Court.
By O. F. PRATT,
Chief Deputy. [14]

[Endorsed]: No. 9885. United States Circuit Court of Appeals for the Ninth Circuit. People of the State of California, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner, Appellant, vs. John Howard Bruce, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Nevada.

Filed August 6, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Earl Warren
Attorney General

State of California
Legal Department

San Francisco, August 7, 1941

Honorable Paul P. O'Brien, Clerk
U. S. Circuit Court of Appeals
P. O. Box 547
San Francisco, California

Re: People of the State of Cal. ex rel McColgan as State Franchise Tax Administrator

vs.

John Howard Bruce, No. 9885.

Dear Sir:

In compliance with subdivision 6 of Rule 19 of the Rules of Practice of the United States Circuit

Court of Appeals for the Ninth Circuit, Appellant wishes to adopt as his points on appeal the points as stated in the statement of points in the transcript of record, and to designate for printing the entire record certified by the District Court.

Very truly yours,
EARL WARREN,
Attorney General
H. H. LINNEY
Deputy
VALENTINE BROOKES
Deputy
Attorneys for Appellant

VB:FB
Copy to
Axel P. Johnson, Esq.
Attorney for Appellee

[Endorsed]: Filed Aug. 8, 1941. Paul P. O'Brien, Clerk.